92-905

Supreme Court, U.S.
FILED
NOV 24 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1992

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii Corporation; TSUNG HAI LIN aka THEODORE T. H. LIN and MAY KWONG,

Petitioners,

vs.

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR A WRIT OF CERTIORARI

GARY VICTOR DUBIN
Counsel for Petitioners
Seven Waterfront Plaza
Suite 400
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
(808) 537-2300

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is it a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America for a State to require a deposit of disputed rental amounts into a landlord-tenant rent trust fund, without a probable cause hearing, as a precondition for a tenant to be allowed to have a judicial determination and trial as to whether it has breached a lease agreement and has the right to remain in possession of the premises and to assert any defenses and offsets that it may have with respect to any rental amounts actually owed for the purpose of determining its right to possession under its lease agreement?

IDENTIFICATION OF PARTIES

The Parties to the proceedings below are listed in the front caption to this Petition.

Petitioner Honsew, Inc., has no parent or subsidiary companies. It is not known whether Respondent Partnership has any parent or subsidiary companies.

TABLE OF CONTENTS

Page

Question Presented i

Identification of Parties ii

Table of Contents iii

Table of Authorities iv

Decisions Below 1

I. JURISDICTIONAL STATEMENT 1

II. STATEMENT OF THE CASE 2

III. LEGAL ARGUMENT 6

Point 1: The Hawaii Rent Trust Fund Statute On Its Face And Now As Applied By The Hawaii Supreme Court Is Clearly A Violation Of Fourteenth Amendment Due Process Of Law 6

Point 2: The Hawaii Rent Trust Fund Statute On Its Face And Now As Applied By The Hawaii Supreme Court Is Clearly A Violation Of Fourteenth Amendment Equal Protection Of The Laws 8

IV. CONCLUSION 9

Appendices 1 through 4 ..... App. 1-App. 15

TABLE OF AUTHORITIES

Page

CASES

Brunswick Corp. v. Galaxy Cocktail Lounge, 54 Haw. 656, 513 P.2d 1390 (1973) 8

Finishing v. Di-Chem, 419 U.S. 601 (1975) 7

Fuentes v. Shevin, 407 U.S. 67 (1972) 6, 7, 8

Lindsey v. Normet, 405 U.S. 56 (1972) 5, 7

Sniadach v. Family Financial Corp. of Bayview, 395 U.S. 337 (1969) 6, 9

CONSTITUTIONAL PROVISIONS

14th Amendment, U.S. Constitution 5, 6

STATUTES

28 U.S.C. § 1257 1

§ 666-21, Hawaii Revised Statutes 2

DECISIONS BELOW

This Petition seeks review by certiorari of a Memorandum Opinion of the Hawaii Supreme Court entered on August 26, 1992, affirming the Judgment of a State District Court which had entered judgment for possession of leased premises in favor of Respondent on October 9, 1990, following Petitioners' inability to deposit disputed rents in the amount of $134,650.64 into Court as a precondition for any trial on the rent issues.

None of these decisions to Petitioners' knowledge was published.

These decisions are set forth in Appendices 1 and 2 of this Petition in their entirety.

I

JURISDICTIONAL STATEMENT

The decision of the Hawaii Supreme Court, the highest Court of the State, sought to be reviewed, was entered on August 26, 1992, within the time period for filing this Petition with this Court.

No rehearing before the Hawaii Supreme Court was requested.

This Petition is brought pursuant to 28 U.S.C. § 1257.

II

STATEMENT OF THE CASE

In 1984, the Legislature of the State of Hawaii passed the RENT TRUST FUND STATUTE, known as Section 666-21 in the Hawaii Revised Statutes, the full text of which is set forth in Appendix 3 to this Petition. That law requires tenants to post the full amount of any disputed rent as a *precondition* for being allowed to have a trial on the merits in opposition to a landlord's eviction claims, and not even a probable cause hearing is first allowed.

In other words, if you claim that you do not owe your landlord any rent, by way of offset or calculation, in Hawaii your landlord automatically is allowed to toss you out on the street unless you post the amount of the disputed rent in order to *merit* a trial, whether you ultimately are found to owe the landlord anything or not.

No other State has or has ever had such a statute.

While the State of Hawaii does allow the tenant to pursue any claims for breach of the lease *separately*, usually in its Circuit Courts, which takes considerably longer, the landlord is allowed to pursue its claims for summary possession in the District Courts, of inferior jurisdiction, which usually allow the landlord a trial in a matter of weeks *if* the tenant is able to post the disputed rent *first*.

Perhaps such a statute might work reasonably well as a practical matter, in small residential lease disputes, where rental payments may be small and the legal issues narrow and the witness list short; it is obvious that *in*

commercial lease disputes such a precondition to adjudication might be highly unfair and prejudicial.

Petitioners operated a manufacturing company with over 100 employees; in the garment business, their ability to fill their seasonal orders in a timely manner was crucial to their finances. Fabric had to be ordered well in advance, orders secured months in advance, employees retained at peak times, credit prearranged. Petitioners were induced to move their manufacturing operation to Respondent's new Center, with promises written into their new lease of reimbursement for tenant improvements and early move-in times, consistent with their manufacturing needs.

Petitioners however were forced to move into uncompleted space, to spend $100,000 themselves for such self-help measures as temporary electricity and air-conditioning vital to employee safety, and they made leasehold improvements in excess of $170,000. Also, they sustained losses in excess of $3,000,000 due to Respondent's breach of the terms of the written lease, as they were unable to fill orders in a timely manner.

Accordingly, Petitioners sued Respondent and its principals in First Circuit Court in Honolulu, for damages and as an offset to their rental obligations, on May 9, 1990, but the Respondent then ran to Honolulu District Court, an inferior jurisdiction rendering judgment without trial by jury and which has exclusive jurisdiction in Hawaii over summary possession cases, in July 1990, and while delaying any adjudication there invoked the RENT TRUST FUND STATUTE and demanded the Petitioners ultimately deposit into District Court $134,650.64 as a

condition for a District Court trial, irrespective of whatever amounts Respondent might owe Petitioners as offsets.

Petitioners, already financially devastated by the breach of the lease agreement by Respondent, were unable to post the amount of the so-called "disputed rent" (which did not factor in the monies that they had spent on leasehold improvements that were reimburseable to them under the lease, although not called "rent" per se), and as an automatic consequence the District Court ordered the Sheriff to evict Petitioners from their manufacturing facility, no matter the fatal, consequential disruption of their manufacturing process, the expensive unbolting of their multi-million-dollar custom machinery, and the displacement of their 100 employees.

Of course, Petitioners had theoretically their remedy of their breach of contract claim in the First Circuit Court, the trial court of general jurisdiction in Hawaii, but as a practical matter their company and then themselves as individuals were thrown into bankruptcy as the claims of creditors and employees mounted against them, with not even any funds to pay further litigation expenses or for this Petition.

Immediately upon being ordered to vacate the premises under the RENT TRUST FUND STATUTE, without a trial or even a probable cause hearing, Petitioners sought relief in the Hawaii Supreme Court, and a stay of the writ of possession, but were denied any relief by the Hawaii Supreme Court, in a unanimous opinion that makes it clear that the RENT TRUST FUND STATUTE in Hawaii is applied and interpreted precisely as challenged here; the

Hawaii Supreme Court found the factual circumstances of these Petitioners *irrelevant*, holding that that Statute could under the Fourteenth Amendment be applied precisely that way, given the unique nature of the landlord-tenant relationship, citing as authority this Court's supposed decision in *Lindsey v. Normet*, 405 U.S. 56 (1972); see full text of Hawaii Supreme Court opinion, set forth in Appendix 2, especially page 11, relying on *Lindsey*.

The federal constitutional issues were raised by Petitioners at *every* stage of the proceedings below.

Petitioners first opposed the application to them of the RENT TRUST FUND STATUTE, by opposing memorandum filed July 19, 1990, "as a matter of state and federal constitutional law", which "would render that statute unconstitutional under the . . . United States Constitution".

And, at every trial court proceeding under the RENT TRUST FUND STATUTE, on which occasions the State District Court Judge felt bound to exclude any evidence of offset or even nonpayment to the Petitioners of contractual leasehold improvement reimbursements, the federal due process and equal protection issues were raised.

Similarly, in the Hawaii Supreme Court all of the federal constitutional issues were expressly addressed in Petitioners' Opening Brief below, both in the question presented to the Hawaii Supreme Court and in legal argument, to wit: "the 1984 Hawaii Rent Trust Fund Statute is clearly unconstitutional on its face, in violation of . . . the United States Constitution, Amendment 14 (exhibited)".

Direct reference to and consideration of the federal constitutional issues can be verified in the opinion of the Hawaii Supreme Court which itself directly considers and rejects that contention, in Appendix 2 of this Petition, page 11 of the Opinion.

III

LEGAL ARGUMENT

The Hawaii RENT TRUST FUND STATUTE is a constitutional *anomaly*. The Hawaii Legislature, in passing this unique law, ignored the traditional notice and opportunity-to-be-heard requirements of the Fourteenth Amendment. And the Hawaii Supreme Court, in turn, has misinterpreted this Court's prior Fourteenth Amendment precedents, becoming lost in an irrelevant discussion of additional remedies in Hawaii law for proving offsets at a later time as somehow justifying obvious constitutional maladies with respect to leasehold possessory rights.

Point 1

The Hawaii Rent Trust Fund Statute on its face and now as applied by the Hawaii Supreme Court is clearly a violation of Fourteenth Amendment Due Process of Law.

Due process of law requires that one be given his or her "day in court" – a meaningful hearing – before being deprived of substantive rights; *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Financial Corp. of Bayview*, 395

U.S. 337 (1969); *Finishing v. Di-Chem*, 419 U.S. 601 (1975). Yet, here, Petitioners were literally kicked out on the sidewalk with their equipment and machinery without any adjudication of substantive rights, rendering a multi-million-dollar investment worthless.

Although, as the Hawaii Supreme Court observed below, in *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court did uphold an Oregon statute that required a rent deposit pending adjudication, that mandatory rent trust deposit was required, not for a trial on the merits, as in Hawaii, but instead only if the tenant required a continuance.

Thus, the same group of Justices that decided *Lindsey* less than four months later, in *Fuentes v. Shevin*, 407 U.S. 67, 85 n.15 (1972), made it clear that such statutes like that presently in Hawaii would be *unconstitutional:*

> These sorts of provisions for recovery of property by posting security are, of course, entirely different from the security requirement upheld in Lindsey v. Normet, 405 U.S. 56, 65. There, the Court upheld a requirement that a tenant wanting a continuance of an eviction hearing must post security for accruing rent during the continuance. The tenant did not have to post security in order to remain in possession before a hearing; rather, he had to post security only in order to obtain a continuance of the hearing. Moreover, the security requirement in Lindsey was not a recovery provision. For the tenant was not deprived of his possessory interest even one day without opportunity for a hearing.

The Hawaii Supreme Court has misinterpreted *Lindsey* and ignored *Fuentes*. There was no hearing allowed below, except for the purpose of fixing the "rent", prior to

*dis*possession. And, moreover, the record shows that the security requirement was not to secure a continuance as the requirement of posting of the disputed rent was entered on the *very day of trial* and trial was denied because the disputed rent could not be posted as ransom, in effect, for a hearing. The order of the State District Court Judge, who openly found his hands tied by an unreasonable law, requiring a *pre*deposit was entered on October 9, 1990, *the same day* that the trial was to commence *if* the deposit were made; see order below, Appendix 1, paragraphs 5 and 6.

Point 2

The Hawaii Rent Trust Fund Statute on its face and now as applied by the Hawaii Supreme Court is clearly a violation of Fourteenth Amendment Equal Protection of the Laws.

It is textbook constitutional law that a State may not discriminate in the affording of its citizens judicial remedies based upon mere ability to pay, yet that is also what the Hawaii RENT TRUST FUND STATUTE does – those who have the ability to deposit disputed rents in Court are allowed to proceed to trial and those who cannot, suffer judgment and eviction without a hearing.

The Hawaii Supreme Court, in its opinion below, sidesteps the equal protection issue by concluding that tenants have an alternative remedy in Hawaii, a suit for damages *after* their rent-trust-fund eviction; see opinion, Appendix 2, page 10. Such second-adjudication relief not only ignores the injury to substantive possessory leasehold rights that the *Fuentes* Court by express words

declared unconstitutional. It overlooks the practical consequences of the RENT TRUST FUND STATUTE, which in this case pushed Petitioners into bankruptcy and made that second adjudicatory right illusory.

IV

CONCLUSION

The proceedings below should be *summarily* reversed as a Fourteenth Amendment violation, and the Hawaii RENT TRUST FUND STATUTE declared *unconstitutional,* and the Hawaii Supreme Court encouraged to return to its earlier pioneering thought which until now has always been at the forefront of due process and equal protection issues, when, for instance, in *Brunswick Corp. v. Galaxy Cocktail Lounge,* 54 Haw. 656, 660, 661-662 (1973), it more clearly saw the need for preserving if not extending post-*Sniadach* developments by requiring at the least probable cause hearings:

> The due process seedling planted by Justice Douglas with regard to pre-judgment garnishment of wages has since matured into a sturdy tree under whose shade debtors have taken respite from the heat of unfair provisional remedies formerly at the disposal of creditors . . . [failing] to provide for prior notice and an opportunity to be heard. . . .

More such constitutional shade is now needed in Hawaii.

Respectfully submitted,

GARY VICTOR DUBIN
Counsel for Petitioners

Honolulu, Hawaii
November 24, 1992

APPENDIX 1

of Counsel:
OLIVER, LEE, LAWHN,
OGAWA & LAU
Attorneys-at-Law
A Partnership of
Law Corporations

OCT 9 4 10PM '90

DISTRICT COURT OF
THE FIRST CIRCUIT
CLERK C. LUM

ROY T. OGAWA 1821-0
A. DEBBIE JEW 3213-0
600 Ocean View Center
707 Richards Street
Honolulu, Hawaii 96813
Telephone: 533-3999
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership, Plaintiff, vs. MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii General Partnership, HONSEW, INC., a Hawaii Corporation, TSUNG HAI LIN aka THEODORE T.H. LIN and MAY KWONG, Defendants. and JACKSON PACIFIC JOINT VENTURE dba JACKSON CONTRACTORS, a Hawaii Registered General Partnership, Intervenor.	CIVIL NO. H90-2900 ORDER GRANTING PLAINTIFF'S MOTION FOR ESTABLISHMENT OF RENT TRUST FUND

ORDER GRANTING PLAINTIFF'S MOTION FOR ESTABLISHMENT OF RENT TRUST FUND

This Court having considered Plaintiff's Motion for Establishment of Rent Trust Fund, the Memoranda submitted by the parties, the arguments of counsel, the evidence presented, the records and files herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's Motion for Establishment of Rent Trust Fund is granted;

2. On or before September 15, 1990, Defendants shall deposit past due rent, and rent due on September 1, 1990, in the total amount of $134,650.64, which represents the rent from March 1990 to September 1990, inclusive, in the amount of $149,011.64, less Defendants' rental payment of $14,361.00, with the Clerk of the District Court of the First Circuit. The amount of the rent from March 1990 to September 1990 is calculated as follows:

Month	Base Rent	C.A.M.	G.E.T.
March 1990	14,413.85	3,944.00	764.97
April 1990	14,413.85	3,944.00	764.97
May 1990	16,698.00	4,569.00	886.20
June 1990	16,698.00	4,569.00	886.20
July 1990	16,698.00	4,569.00	886.20
August 1990	16,698.00	4,569.00	886.20
September 1990	16,698.00	4,569.00	886.20
	$112,317.70	$30,733.00	$5,960.94

3. Beginning on October 1, 1990 and on the first day of each month thereafter, Defendants shall deposit further rents in the amount of $22,153.20 per month with the

Clerk of the District Court for deposit into the rent trust fund until further order of this Court;

4. All sums deposited with the Clerk shall be deposited by the Clerk into an interest bearing account with a federally insured bank or savings and loan in the State of Hawaii;

5. Pursuant to H.R.S. § 666-21(b), if Defendant is unable to comply with this Order and fails to pay the required amount of rent to the Clerk of the District Court of the First Circuit, the Plaintiff shall have judgment for possession and execution shall issue accordingly; and

6. The trial on Plaintiff's Complaint for Summary Possession shall be scheduled for October 9, 1990 at 9:00 a.m.

DATED: Honolulu, Hawaii, Oct. 9, 1990

TANY S. HONG [SEAL]

/s/ Tany S. Hong
JUDGE OF THE ABOVE
ENTITLED COURT

APPROVED AS TO FORM:

/
Gary Victor Dubin
Attorney for Defendants

APPENDIX 2

NO. 14881

IN THE SUPREME COURT OF THE STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership, Plaintiff-Appellee, vs. MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii Corporation; TSUNG HAI LIN aka THEODORE T. H. LIN and MAY KWONG, Defendants-Appellants.	CIV. NO. H90-2900 APPEAL FROM THE DENIAL OF DEFENDANTS' DEMAND FOR TRIAL BY JURY, JULY 20, 1990; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS COMPLAINT OR TO TRANSFER ACTION TO FIRST CIRCUIT COURT, OR TO STAY ALL PROCEEDINGS, JULY 30, 1990; ORDER GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM THE ORAL ORDER GRANTING PLAINTIFF'S MOTION FOR ESTABLISHMENT OF RENT TRUST FUND, OCTOBER 9, 1990; ORDER GRANTING PLAINTIFF'S EX PARTE MOTION FOR ISSUANCE OF JUDGMENT FOR POSSESSION AND WRIT OF POSSESSION, OCTOBER 9, 1990; JUDGMENT FOR POSSESSION, OCTOBER 9, 1990. DISTRICT COURT OF THE FIRST CIRCUIT

MEMORANDUM OPINION

(Filed Aug. 26, 1992)

The defendants-appellants Mayflower International Company, DBA Honsew (Honsew), Tsung Hai Lin, aka Theodore T. H. Lin (Lin), and May Kwong (Kwong) (collectively the defendants)[1] appeal from a judgment for possession in favor of Pauahi Associates (Pauahi), the landlord of a commercial space in the Maunakea Marketplace. On appeal, the defendants challenge the constitutionality of Hawaii Revised Statutes (HRS) § 666-21,[2]

---

[1] Honsew is a general partnership which leased the subject property. Lin and Kwong guaranteed the lease by executing a guaranty agreement dated May 26, 1989.

[2] HRS § 666-21 (1985) provides in relevant part:

> *Rent trust fund.* (a) *At the request of* either the tenant or *the landlord in any court proceeding in which the payment or nonpayment of rent is in dispute, the court shall order the tenant to deposit any disputed rent as it becomes due into the court as provided under subsection (c),* and in the case of a proceeding in which a rent increase is in issue, the amount of the rent prior to the increase; provided that the tenant shall not be required to deposit any rent where the tenant can show to the court's satisfaction that the rent has already been paid to the landlord; provided further that if the parties had executed a written instrument agreeing that the rent could be withheld or deducted, the court shall not require the tenant to deposit rent into the fund. *No deposit of rent into the fund ordered under this section shall affect the tenant's right to assert* either that payment of rent was made or *that any grounds for nonpayment of rent exist under this chapter.*
>
> (b) *If the tenant is unable to comply with the court's order under subsection (a) in paying the required amount*

which, at the request of either the tenant or the landlord, requires tenants to deposit any disputed rent into a "rent trust fund" pending judicial disposition of the dispute. We conclude that the appeal is without merit and affirm the judgment for possession.

I.

Pauahi and Honsew entered into a commercial lease dated May 26, 1989, whereby Pauahi leased Honsew a commercial space in the Maunakea Marketplace. A dispute occurred because the leased premises were not completed to the satisfaction of Honsew, who in turn did not pay several months rent. Pauahi filed suit against the defendants, *inter alia,* for summary possession of the leased premises, termination of the lease, and for the rent amounts allegedly due and owing. The district court

---

of rent to the court, the landlord shall have judgment for possession and execution shall issue accordingly. . . .

(c) *The court in which the dispute is being heard shall accept and hold in trust any rent deposited under this section* and shall make payments out of money collected as provided in this section. *The court shall order payment* of the money collected or portion thereof *to the landlord if the court finds* that the rent is due and has not been paid to the landlord and *that the tenant did not have any basis to withhold, deduct, or otherwise set off the rent not paid. The court shall order payment* of the money collected or portion thereof *to the tenant if the court finds* that the rent is not due or has been paid, or *that the tenant had a basis to withhold, deduct, or otherwise set off the rent not paid.*

(Emphasis added.)

retained the summary possession issue, and the claim for rental damages on the lease was bifurcated and transferred to circuit court for a jury trial. Although the record is unclear in this regard, the circuit court proceeding is apparently still pending.[3]

Pauahi moved the district court for the establishment of a rent trust fund, and on August 29, 1990, pursuant to HRS § 666-21(a), the district court ordered Honsew to deposit $134,650.64, representing rental amounts through September 1990, into the rent trust fund, plus rent payments for all subsequent months as they became due under the terms of the lease. Because Honsew failed to make the ordered deposits, the district court entered judgment for possession in Pauahi's favor. The defendants appealed.

II.

The issue before us on appeal is whether HRS § 666-21 (1985) is violative of the defendants' due process and equal protection rights because it allegedly requires a deposit of disputed rent amounts into a rent trust fund as a precondition to a determination of the rights and obligations of the parties with respect to disputed rent payments and, in particular, to the adjudication of various defenses and offsets proffered by the defendants.

---

[3] It would be an understatement to say that the record in this case is a shambles.

III.

A.

HRS § 666-21 (1985) is a vehicle for determining the rights and obligations of landlords and tenants who are parties to lease agreements with respect to disputed rent amounts. If the tenant does not deposit the required rent amounts into the trust fund, HRS § 666-21(b) directs the district court to grant the landlord summary possession, consistent with the statutory framework established by HRS chapter 666, and, in particular, HRS §§ 666-1[4] and 666-6.[5] The district court has exclusive jurisdiction over the issue of summary possession. *Kimball v. Lincoln*, 72 Haw. 117, 125, 809 P.2d 1130, 1134 (1991).

---

[4] HRS section 666-1 (1985) provides:

> *Summary possession on termination or forfeiture of lease.* Whenever any lessee or tenant of any lands or tenements, or any person holding under the lessee or tenant, holds possession of lands or tenements without right, after the termination of the tenancy, either by passage of time or by reason of any forfeiture, under the conditions or covenants in a lease, or, if a tenant by parol, by a notice to quit of at least ten days, the person entitled to the premises may be restored to the possession thereof in [a] manner hereinafter provided.

[5] HRS section 666-6 (1985) provides:

> *Summary possession proceedings; venue.* In the case of summary possession proceedings, the person entitled to the possession of the premises shall bring and prosecute the person's action *in the district court* of the circuit wherein the lands and premises in question are situated.

(Emphasis added.)

The right to summary possession is distinct from the issue of a tenant's defenses and claims of offsets to claimed rent. Offsets and defenses to claims of rent amounts due and owing, which are damage issues, are subject to circuit court jurisdiction. HRS § 666-21 (1985) does not preclude any party from bringing an action in circuit court for the adjudication of such issues.[6] The defendants in fact commenced just such an action in the First Circuit Court on May 9, 1990, in Civil No. 90-1433-05. *See* Exhibit 1, attached to Defendants' Motion to Dismiss Complaint or to Transfer Action to First Circuit Court, or to Stay All Proceedings. (R.A. Vol. 1, at 77-125). Moreover, as noted above, the district court transferred the defendants' damage claims to the circuit court for trial by jury. Accordingly, the defendants have an opportunity to adjudicate their claims of offset and other defenses to the rent dispute in the correct forum.

B.

"The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." *Sandy Beach Defense Fund v. City Council*, 70 Haw. 361, 378, 773 P.2d 250, 251 (1989) (citation omitted). The defendants have not been deprived of due process protection in this

---

[6] HRS § 666-21(a) provides in relevant part that "[n]o deposit of rent into the fund ordered under this section shall affect the tenant's rights to assert either that payment of rent was made or that any grounds for nonpayment of rent exist under this chapter."

case. They have been accorded an opportunity to be heard of the issues of defenses and offsets in the circuit court.

C.

The Hawaii Supreme Court has held that, for purposes of equal protection analysis, unless there is a suspect classification or fundamental rights are implicated, the applicable standard of review is the rational basis standard. *Sandy Beach Defense Fund v. City Council,* 70 Haw at 380, 773 P.2d at 262. In this case, the defendants are apparently arguing that HRS § 666-21 (1985) makes an unconstitutional distinction between those tenants who can make the required rental deposit and those who cannot. Their rationale seems to be that they have been denied the equal protection of the laws because Pauahi's right to summary possession has been adjudicated before the resolution of their defenses and alleged offsets to any rents due and owing.

The distinction alleged by the defendants is an artificial one. It is not really a "classification" for equal protection purposes. Whether the tenant pays into the rent trust fund does not substantively affect the only adjudication that the district court has jurisdiction to make – the landlord's right to summary possession. The circuit court is the proper forum in which to resolve the tenant's defenses and claims of offsets. Nothing in HRS § 666-21 (1985) prevents them from doing so. And, as indicated, there appears to be at least one (and possibly two) circuit court proceeding(s) pending in which these claims can be adjudicated.

Additionally, the United States Supreme Court has already upheld the constitutionality of depositing disputed amounts into a fund pending adjudication of the substantive issues. In *Lindsay v. Normet*, 405 U.S. 56 (1972), the United States Supreme Court upheld the constitutionality of the Oregon Forcible Entry and Wrongful Detainer Statute, which requires the tenant to deposit accruing rent into a fund pending settlement of a dispute with the landlord. The *Lindsay* Court noted that there is a unique relationship between a landlord and a tenant that justifies allowing special procedures to effect a speedy adjudication of disputes. Inasmuch as the tenant is in possession of property belonging to the landlord, there must be some expeditious judicial mechanism allowing the landlord to repossess his property where the tenant has defaulted on the lease. Thus, the Court concluded that Oregon was well within its constitutional powers in providing for a rapid and peaceful settlement of landlord-tenant disputes. *Id.* at 72-73.

Accordingly, we conclude that the defendants have failed to demonstrate that HRS § 666-21 (1985) violates the equal protection clauses of the fourteenth amendment to the United States Constitution and article I, § 5 of the Hawaii Constitution.

IV.

We therefore affirm the district court's judgment for possession in favor of Pauahi.

DATED: Honolulu, Hawaii, August 26, 1992.

Gary Victor Dubin,
on the briefs for
appellants.

Roy T. Ogawa, A. Debbie
Jew and Linda R. Kobuke
(Oliver, Lee, Lawhn, Ogawa
and Lau) on the brief for
appellee.

/s/ Herbert T.F. Lum

/s/ James H. Watkatsuki

/s/ Ronald T.Y. Moon

/s/ Robert G. Klein

/s/ Steven H. Levinson

APPENDIX 3

§ 666-21 Rent trust fund (Hawaii Revised Statutes)

(a) At the request of either the tenant or the landlord in any court proceeding in which the payment or nonpayment of rent is in dispute, the court shall order the tenant to deposit any disputed rent as it becomes due into the court as provided under subsection (c), and in the case of a proceeding in which a rent increase is in issue, the amount of the rent prior to the increase; provided that the tenant shall not be required to deposit any rent where the tenant can show to the court's satisfaction that the rent has already been paid to the landlord; provided further that if the parties had executed a written instrument agreeing that the rent could be withheld or deducted, the court shall not require the tenant to deposit rent into the fund. No deposit of rent into the fund ordered under this section shall affect the tenant's rights to assert either that payment of rent was made or that any grounds for nonpayment of rent exist under this chapter.

(b) If the tenant is unable to comply with the court's order under subsection (a) in paying the required amount of rent to the court, the landlord shall have judgment for possession and execution shall issue accordingly. The writ of possession shall issue to the sheriff or to a police officer of the circuit where the premises are situated, ordering the sheriff or police officer to remove all persons and possessions from the premises, and to put the landlord, or the landlord's agent, into full possession of the premises.

(c) The court in which the dispute is being heard shall accept and hold in trust any rent deposited under

this section and shall make payments out of money collected as provided in this section. The court shall order payment of the money collected or portion thereof to the landlord if the court finds that the rent is due and has not been paid to the landlord and that the tenant did not have any basis to withhold, deduct, or otherwise set off the rent not paid. The court shall order payment of the money collected or portion thereof to the tenant if the court finds that the rent is not due or has been paid, or that the tenant had a basis to withhold, deduct, or otherwise set off the rent not paid.

(d) The court, upon finding that either the landlord or the tenant raised the issue of payment or nonpayment of rent in bad faith, shall order that person to pay the other party reasonable interest on the rent deposited into the trust.

APPENDIX 4

Fourteenth Amendment to U.S. Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
DEC 28 1992
OFFICE OF THE CLERK

No. 92-905

In The

Supreme Court of the United States

October Term, 1992

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii Corporation; TSUNG HAI LIN aka THEODORE T.H. LIN and MAY KWONG,

Petitioners,

vs.

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF IN OPPOSITION

Roy T. Ogawa
Oliver, Lau, Lawhn & Ogawa
600 Ocean View Center
707 Richards Street
Honolulu, Hawaii 96813
(808) 533-3999

Counsel for Respondent Pauahi Associates

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

45pp

QUESTION PRESENTED

Is it a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America for a state, in balancing the respective property rights of landlords and tenants, to require a tenant who is not paying rents to deposit any disputed rents into a court administered rent trust fund in order to remain in possession of landlord's property pending a determination of the rights and obligations of the parties, where the tenant cannot show to the court's satisfaction that tenant has already paid the rents or is otherwise allowed to withhold or deduct rents pursuant to a written agreement that the rents could be withheld or deducted as provided in Hawaii Revised Statutes Section 666-21?

IDENTIFICATION OF PARTIES

The parties to the proceedings held below in the courts of the State of Hawaii consisted of the following:

1. PAUAHI ASSOCIATES, a Hawaii General Partnership (hereinafter "Respondent");

2. MAYFLOWER INTERNATIONAL COMPANY, dba Honsew, Inc., a Hawaii General Partnership (hereinafter "MAYFLOWER");

3. HONSEW, INC., a Hawaii corporation (hereinafter "HONSEW");

4. TSUNG HAI LIN, aka Theodore T. H. Lin (hereinafter "LIN"); and

5. MAY KWONG (hereinafter "KWONG").

MAYFLOWER, LIN, KWONG and HONSEW (hereinafter collectively referred to as "Petitioners") were the Defendants-Appellants in the case before the Hawaii Supreme Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

IDENTIFICATION OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

DECISIONS BELOW 1

COUNTER-STATEMENT OF JURISDICTION 1

COUNTER-STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THE HAWAII RENT TRUST FUND STATUTE, HAWAII REVISED STATUTES SECTION 666-21, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES 8

A. THE SEGREGATION OF THE SUMMARY POSSESSION ISSUE FROM THE REMAINING ISSUES IS CONSTITUTIONALLY PERMISSIBLE 8

B. HAWAII REVISED STATUTES SECTION 666-21 PROVIDES FOR NOTICE AND A REASONABLE OPPORTUNITY TO BE HEARD 10

II. THE ESTABLISHMENT OF A RENT TRUST FUND PURSUANT TO HAWAII REVISED STATUTES SECTION 666-21 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES 13

TABLE OF CONTENTS – Continued

Page

A. THE COURT SHOULD EMPLOY THE "RATIONAL BASIS" TEST IN ANALYZING THE VALIDITY OF THE HAWAII STATUTE 14

B. THE CLASSIFICATIONS OF THE HAWAII RENT TRUST FUND STATUTE ARE REASONABLY RELATED TO A LEGITIMATE STATE GOAL 16

CONCLUSION 19

APPENDICES 1 THROUGH 5..... App. 1 - App. 20

TABLE OF AUTHORITIES

Page

CASES

Bianchi v. Morales, 262 U.S. 170 (1923) 9

Craig v. Boren, 429 U.S. 190 (1976) reh'g denied, 429 U.S. 1124 (1977) 14

Friedman v. Rogers, 440 U.S. 1 (1979), reh'g denied, 441 U.S. 917 (1979) 14

Fuentes v. Shevin, 407 U.S. 67 (1972) 7, 12

Hunter v. Erickson, 393 U.S. 385 (1969) 14

James v. Valtierra, 402 U.S. 137 (1971) 16

Lindsey v. Normet, 405 U.S. 56 (1972) ..... *passim*

McGowan v. Maryland, 366 U.S. 420 (1965) 16

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) 11, 12

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) 14

Ross v. Moffit, 417 U.S. 600 (1974) 16

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 11, 12

Williams v. Rhodes, 393 U.S. 23 (1968) 14

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, U.S. Constitution.. 7, 8, 11, 13

STATUTES

Section 666-21, Hawaii Revised Statutes 2, 8, 10, 11, 13

DECISIONS BELOW

The Memorandum Opinion of the Supreme Court of the State of Hawaii, dated August 26, 1992, was reprinted in the Petition as Appendix ("App.") "2". On November 24, 1992, the Hawaii Supreme Court entered its Order allowing costs pursuant to Respondent's Verified Bill of Costs. (Respondent's Appendix "1") However, as of the filing of the Petition on November 24, 1992, final judgment had not yet been entered by the Hawaii Supreme Court. Final judgment was entered on December 11, 1992. (Respondent's Appendix "2")

COUNTER-STATEMENT OF JURISDICTION

MAYFLOWER INTERNATIONAL COMPANY, dba Honsew, Inc., a Hawaii General Partnership ("MAYFLOWER"), TSUNG HAI LIN, aka Theodore T. H. Lin ("LIN") and MAY KWONG's ("KWONG") lack the requisite standing to bring this appeal. An entry of default was entered against MAYFLOWER and KWONG, which default has not been set aside or appealed. Transcript of July 9, 1990, page 3, lines 4-12; Transcript of July 30, 1990, page 44, lines 20-25 to page 45, lines 1-18. (Respondent's Appendices "3" and "4") All claims against LIN and KWONG, Guarantors under the Lease, have been bifurcated from the present action, and were to be transferred to the Circuit Court of the First Circuit for jury trial at Petitioners' and HONSEW's request. Transcript of July 30, 1990, page 43, lines 8-25 to page 44, lines 1-18. (Respondent's Appendix "4") As a Guarantor of the Lease, LIN has no right to possession of the subject premises.

COUNTER-STATEMENT OF THE CASE

Hawaii Revised Statutes Section 666-21, known as the Hawaii Rent Trust Fund Statute, seeks to balance the property interest of the landlord, which is just as deserving, with the property interests of the tenant. The statute implicitly recognizes that a tenant who is unable to pay rents as they become due is very likely to be uninterested in a speedy resolution of the court proceedings that could terminate its use of the property. The requirement of payment of rents as they become due into a court administered rent trust fund provides partial security to the landlord while the tenant remains in possession of the landlord's property and protects the monies of the tenant at the same time. The Rent Trust Fund Statute makes deposits to the rent trust fund a precondition to continued possession by a tenant who is not paying rent, but the rent trust fund deposits are not a precondition to a trial on the merits. The statute entitles the tenant to a hearing prior to the issuance of an order, to show that the rents have already been paid or to show the existence of a written agreement allowing it to withhold or deduct payments of rent.

The statute merely requires the tenant to deposit into the court administered rent trust fund the amounts that the court finds would have been due and owing according to the terms of the lease. The District Courts of the State of Hawaii are courts of record and also have jurisdiction to adjudicate the entire dispute unless one of the parties requests that the claims for damages and offsets be transferred to the Circuit Court of the State of Hawaii for a jury trial.

Without the Rent Trust Fund Statute, upon mere allegations of offsets to rents due under a lease, a tenant could remain in possession of the landlord's property for a substantial period of time without paying rents even though the lease agreement prohibited such offsets. The landlord could be deprived of its property for a substantial period of time with little hope of ever recovering the back rents from a financially troubled tenant. The Hawaii State Legislature obviously recognized this unfairness and injustice in establishing the Rent Trust Fund Statute. Prior to establishment of the rent trust fund provision in Hawaii, disputes regarding non-payment of rent resulted in lengthy eviction proceedings after which the landlord would be unable to recover the rents which had accrued while the tenant was in possession.

In the case at bar, Petitioners in asserting that they were damaged by moving into an "uncompleted space" have failed to apprise this Court of the explicit terms of Section III, paragraph F of the Lease dated May 26, 1989, by and between Pauahi Associates, as Landlord, and Mayflower International Co., dba Honsew, Inc., as Tenant, which states that:

> If Landlord shall be unable to give possession of the demised premises on the date of the commencement of the term hereof by reason of the fact that the premises are located in a building being constructed and which has not been sufficiently completed to make the premises ready for occupancy or by the reason of the fact that a certificate of occupancy has not been procured, the *Landlord shall not be subject to any liability for the failure to give possession on said date.* (emphasis added)

In signing their Lease for the Maunakea Marketplace, Petitioners were fully aware that the marketplace was still under construction. They had agreed in their Lease that Respondent would not be liable for failure to deliver possession on time due to the uncertainties in the completion of construction, yet Petitioners assert that they could withhold rental payments because of this lack of completion. Furthermore, Petitioners were only "forced" to move into the "uncompleted premises" because their prior landlord had threatened to evict them. Although Respondent accommodated Petitioners' early move into the incomplete marketplace in November of 1989 and allowed them to begin their business operations, the obligation to pay rents did not begin until February of 1990 when Petitioners' improvements and the marketplace were substantially completed. Respondent also paid a leasehold improvement allowance of $120,000.00 for Petitioners' leasehold improvements.

Petitioners almost immediately defaulted in the payment of rents and began to claim numerous alleged offsets as grounds for nonpayment. After receiving notice by certified mail of their default and of Respondent's intent to pursue a summary possession action to evict Petitioners for nonpayment of rents, Petitioners sued Respondent in the First Circuit Court of the State of Hawaii for damages to offset their rental obligations. Respondent subsequently filed its summary possession action in the District Court of the State of Hawaii as required under Hawaii law.

It was Petitioners who utilized numerous dilatory tactics to avoid adjudication of the summary possession proceeding in the hope that they would be able to secure

the funds to pay the delinquent rents. Among other things, Petitioners filed a Motion to Dismiss Complaint or to Transfer Action to First Circuit Court, or to Stay All Proceedings pending a determination in the Circuit Court action.

After the first hearing on the Motion for Establishment of a Rent Trust Fund in July 1990, Petitioners moved for an order to file an interlocutory appeal and received a two-week stay on the establishment of a rent trust fund to allow them to file the appeal. Following the court's subsequent determination that the order was not appealable, Petitioners demanded a full evidentiary hearing to determine the amounts due pursuant to the terms of the Lease. An evidentiary hearing was held on August 2 and 29, 1990 to determine the amount of rents to be deposited into the court administered rent trust fund. After the hearing, Respondent submitted its Order and Petitioners refused to approve the form of the Order. Because of Petitioners' objections, two further hearings were required before the court settled the form of the final rent trust fund order. Although the Order was not filed and signed by the judge until October 9, 1990, the date of the trial, Petitioners failed to disclose to this Court that: (1) Petitioners had been orally informed by the court in August 1990 that Respondent's motion would be granted; (2) Petitioners would be required to deposit rents into the rent trust fund by September 15, 1990; and (3) the proposed Order had been submitted to the court by Respondent in September.

On October 9, 1990, the date for the trial, Petitioners' counsel acknowledged that Petitioners were unable to deposit the rents into the rent trust fund as ordered. Since

Petitioners were in default of the Lease for failure to pay the rents due without offset or deduction and were unable to deposit these rents into the rent trust fund, the court informed counsel for the parties that it would grant a Writ of Possession and Judgment for Possession. At Petitioners' request, the court stayed execution of the writ of possession for three days to allow Petitioners to again seek relief from the State Supreme Court. The State Supreme Court granted a ten-day temporary stay, asked for memoranda of law and then declined to issue a permanent stay pending appeal.

Honsew, Inc. then filed Chapter 11 reorganization proceedings in the United States Bankruptcy Court. After numerous requests for delay by Honsew, Inc., the Bankruptcy Court in February of 1991, finally lifted the automatic stay due to Honsew's inability to pay post-petition rents. By the time Respondent recovered possession of its premises, the unpaid rents due and owing exceeded $245,000.00. This amount remains unpaid. The lawsuit for breach of lease filed by Petitioners in the Circuit Court of the First Circuit of the State of Hawaii in May of 1990 is still pending disposition. Petitioners have made little or no effort to prosecute this action. At no time have Petitioners demanded an early trial in either the District Court action or the Circuit Court action.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the decision of the Hawaii Supreme Court is consistent with the rulings of this Court which uphold

the constitutionality of similar proceedings and statutes. Moreover, the Hawaii Supreme Court's decision does not conflict with the decision of any other state court of last resort or with the decision of any United States Court of Appeals, nor does it involve unsettled federal questions.

In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court established that the Due Process Clause of the Fourteenth Amendment does not impose a constitutional barrier preventing a state from insisting that a tenant provide for accruing rents pending a judicial determination of its disputes with the landlord. Petitioners' assertion of *Fuentes v. Shevin*, 407 U.S. 67 (1972) is inapposite since the Hawaii Rent Trust Fund Statute provides for a hearing and determination of rents due and owing before requiring the tenant to make deposits into the rent trust fund.

This Court further established in *Lindsey* that the Equal Protection Clause of the Fourteenth Amendment is not violated where a state validly singles out possessory disputes between landlords and tenants for especially prompt judicial settlement, even though in practice, the law may result in some inequality. Due to the unique factual and legal characteristics of the landlord-tenant relationship, a state is within its constitutional powers to provide rapid, judicially supervised mechanisms to resolve landlord-tenant disputes. Petitioners' argument that the Rent Trust Fund Statute violates the Equal Protection Clause because it discriminates between tenants who can afford to deposit rents and tenants who cannot afford to deposit rents should be rejected. Although the Hawaii statute may result in some disparate treatment,

the statutory directives of Hawaii Revised Statutes Section 666-21 are reasonably related to legitimate state goals.

ARGUMENT

I. THE HAWAII RENT TRUST FUND STATUTE, HAWAII REVISED STATUTES SECTION 661-21, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Petitioners allege that the Hawaii Rent Trust Fund Statute violates the Due Process Clause of the Constitution because it did not afford Petitioners notice and an opportunity to be heard on the merits of all issues, including Petitioners' claims for offsets prior to the imposition of a rent trust fund. Petitioners' allegations are both factually and legally unsound because the Constitution does not prohibit the segregation of certain issues involving possessory rights for summary disposition, nor does it require a full hearing on the merits of all issues, including claims for offsets prior to this disposition.

A. THE SEGREGATION OF THE SUMMARY POSSESSION ISSUE FROM THE REMAINING ISSUES IS CONSTITUTIONALLY PERMISSIBLE.

The Hawaii Supreme Court applied and followed this Court's reasoning and decision in *Lindsey v. Normet*, 405 U.S. 56 (1972) in finding that the Hawaii Rent Trust Fund

Statute, Hawaii Revised Statutes Section 666-21, was constitutional. In *Lindsey,* this Court found no constitutional barrier to a statute requiring a tenant to deposit accruing rent pending judicial settlement of a dispute with the landlord. *Lindsey,* 405 U.S. at 56. In doing so, this Court found that it was also permissible to segregate an action for possession of property from other actions arising out of the same factual situation even though they may assert valid legal or equitable defenses or counterclaims. *Lindsey,* 405 U.S. at 67-68. In support, this Court cited *Bianchi v. Morales,* 262 U.S. 170 (1923) where the Court had previously upheld Puerto Rico's mortgage law which provided for summary foreclosure of a mortgage without allowing any defense except payment. There the Court concluded that it was permissible under the Due Process Clause to exclude claims of ultimate right from the possessory action and to allow other equitable defenses to be set up in a separate action to annul the mortgage. *Lindsey,* 405 U.S. at 68.

The Hawaii Rent Trust Fund Statute which seeks to balance the property rights of landlords and tenants conforms to the standards set forth in *Lindsey,* in segregating the possessory action from other actions or disputes. As the Court recognized in *Lindsey,* the "Constitution has not federalized the substantive law of landlord-tenant relations" and the Constitution does not forbid a state from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants. *Lindsey,* 405 U.S. at 68. The Hawaii statute treats these undertakings separately and limits the available defenses in a rent trust fund hearing to proof of payments

or proof of written contractual agreements allowing offsets or deductions against payment. If the written lease agreement does not allow offsets to the payment of rents then these matters are separately adjudicated. The statute does not eliminate the tenant's claims. In the case at bar, Petitioners' Complaint filed in the Circuit Court of the First Circuit, State of Hawaii on May 9, 1990 is pending disposition.

B. HAWAII REVISED STATUTES SECTION 666-21 PROVIDES FOR NOTICE AND A REASONABLE OPPORTUNITY TO BE HEARD.

Under the Hawaii statute, a motion for the establishment of a rent trust fund does not automatically result in a court order directing the tenant to deposit monies or face eviction. After the filing of the motion, which must be served upon the tenant according to Rule 5 of the Hawaii District Court Rules of Civil Procedure (Respondent's Appendix "5"), the Hawaii statute provides a tenant with an opportunity to be heard prior to the issuance of a court order. Hawaii Revised Statutes Section 666-21 states in pertinent part:

> (a) *At the request* of either the tenant or the landlord in any court proceeding in which the payment or nonpayment of rent is in dispute, the court shall order the tenant to deposit any disputed rent as it becomes due . . . provided that *the tenant shall not be required to deposit any rent* where the tenant can show to the court's satisfaction that the rent has *already been paid to the landlord;* provided further that *if the parties had executed a written instrument agreeing that the*

> *rent could be withheld or deducted, the court shall not require the tenant to deposit rent into the fund.*

Haw. Rev. Stat. § 666-21 (1985) (emphasis added).

The statute explicitly provides the tenant with the opportunity to show to the "court's satisfaction" that the rent has already been paid to the landlord, or that the parties had executed a written instrument agreeing that the rent could be withheld or deducted. Only after the tenant is unable to show this and after the landlord has established the amount of rents called for under the lease does an order issue.

The cases cited by Petitioners in support of their assertion of a violation of the Due Process Clause of the Fourteenth Amendment are inapposite because, unlike the Hawaii statute, they all involve possessory actions where a person was denied a reasonable opportunity to be heard prior to a seizure.

In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), this Court held that a Wisconsin prejudgment garnishment statute violated the Fourteenth Amendment of the United States Constitution because the statute permitted the freezing of a defendant's wages during the interim between the service of a garnishment petition and the main suit without any opportunity to be heard. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), this Court found a Georgia garnishment statute in violation of the Due Process Clause of the Fourteenth Amendment since a writ of garnishment was not only issued without notice or opportunity for an early hearing but was issued by a court clerk without participation by a judicial officer.

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), this Court held as unconstitutional Florida and Pennsylvania prejudgment replevin statutes which allowed seizure of personal property upon an application by any person who claimed a right to property and who posted a security bond. Neither statute required that the possessor of the property be given notice or an opportunity to be heard prior to the seizure.

The Court in *Fuentes v. Shevin*, in discussing the need to afford an opportunity to be heard also acknowledged that a state had the power to protect the property rights of creditors and to legislate the nature and form of the hearing required:

> Our holding, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors *so long as those creditors have tested their claims to the goods through the process of a fair hearing.* The *nature and form* of such prior *hearings*, moreover, are legitimately open to many potential variations and *are a subject*, at this point, *for legislation* – not adjudication.

Fuentes v. Shevin, 407 U.S. at 96 (emphasis added).

Unlike the statutes reviewed in *Sniadach, North Georgia Finishing* and *Fuentes*, the Hawaii Rent Trust Fund Statute requires service of notice of the motion and a hearing, before the court issues an order requiring a deposit into the rent trust fund. This procedure as established by the Hawaii State Legislature provides a fair and reasonable hearing where the landlord's claims can be tested before an order issues.

In the case at bar, the Honolulu District Court not only held the requisite hearing, but also granted Petitioners' special request for an evidentiary hearing. After two separate days of hearings, the Court determined that the Lease Agreement provided for the payment of rents without offset or deduction and that Petitioners had not paid the rents as provided for under the Lease Agreement. Only then did it order the establishment of the rent trust fund as a condition for remaining in possession pending an adjudication of the remaining issues. Thus, the form of the notice and hearing, under the statute and as applied, are reasonably related to the state's power to balance the property rights of landlords and tenants and should not be overturned as unconstitutional.

II. THE ESTABLISHMENT OF A RENT TRUST FUND PURSUANT TO HAWAII REVISED STATUTES SECTION 666-21 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Hawaii Rent Trust Fund Statute does not violate the Equal Protection Clause because the statutory provisions which require a tenant to deposit disputed rents pending the adjudication of the tenant's right to possession are reasonably related to the State's legitimate objective of expeditiously and peacefully resolving landlord-tenant disputes. Petitioners argue that the statute prejudicially impacts tenants who are unable to deposit disputed rents into a rent trust fund. An analysis of the facts and circumstances behind the law, the interests which the State seeks to protect, and the interests of those who may

be disadvantaged by the operation of the statute establishes that the Hawaii statute passes constitutional muster. *See generally, Williams v. Rhodes,* 393 U.S. 23, 30 (1968).

A. THE COURT SHOULD EMPLOY THE "RATIONAL BASIS" TEST IN ANALYZING THE VALIDITY OF THE HAWAII STATUTE.

Certain legislative classifications, such as race, are inherently suspect and presumptively invalid absent a showing of a compelling state interest. *Hunter v. Erickson,* 393 U.S. 385, 391-392 (1969). Similarly, gender classifications require a showing that the classification bears a "close and substantial relationship to important governmental objectives". *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 273 (1979), citing *Craig v. Boren,* 429 U.S. 190, 197 (1976) reh'g denied, 429 U.S. 1124 (1977). Classifications which are not "suspect" are analyzed under a less exacting standard which requires only that the classification be rationally related to a legitimate state objective. *Friedman v. Rogers,* 440 U.S. 1, 17 (1979), reh'g denied, 441 U.S. 917 (1979). It is this "rational basis" test which should be applied in the instant case.

In *Lindsey v. Normet,* 405 U.S. 56 (1972), where this Court considered an Oregon statute similar to the Hawaii Rent Trust Fund Statute, Appellants urged the Court to apply a more stringent standard than the rational basis test. Appellants argued that a higher standard was required because the need for decent shelter and the right to retain peaceful possession of one's home were fundamental interests which are particularly important to the

poor. The Court rejected Appellants' argument holding that:

> The statute potentially applies to all tenants, rich and poor, commercial and non-commercial; it cannot be faulted for over-exclusiveness or under-exclusiveness. And classifying tenants of real property differently from other tenants for the purposes of possessory actions will offend the equal protection safeguard "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective," or if the objective itself is beyond the State's power to achieve.

Lindsey, 405 U.S. at 70 (citations omitted). The Court explained that the mere rationality standard was sufficient because the Constitution does not guarantee access to dwellings of a particular quality or the right of a tenant to hold-over property without paying rent, although the Constitution does prohibit the confiscation of a landlord's property or the income therefrom. *Lindsey*, 405 U.S. at 74.

In the case at bar, Petitioners claim that the application of the Hawaii Rent Trust Fund Statute discriminates against "impecunious tenants". This is not a "suspect" classification based upon race, alienage, or some other inalterable trait. There is no fundamental right of access to commercial property of a particular quality, nor in the years since *Lindsey* has the Constitution been interpreted to guarantee commercial tenants a right to hold-over property without paying rent. Petitioners have failed to show any circumstances which warrant the application of "strict judicial scrutiny".

B. THE CLASSIFICATIONS OF THE HAWAII RENT TRUST FUND STATUTE ARE REASONABLY RELATED TO A LEGITIMATE STATE GOAL.

The Equal Protection Clause does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. *See Ross v. Moffit*, 417 U.S. 600, 611 (1974) (no violation of equal protection where State refused to provide indigent defendant with legal counsel for discretionary appeal, even though the indigent would be somewhat handicapped in comparison to a wealthy defendant assisted by counsel); *see also James v. Valtierra*, 402 U.S. 137 (1971) (even though referendum arguably hampered persons seeking low income housing from achieving their objective, no violation of equal protection in light of legitimate purpose of referendum process). In *Lindsey*, the Court also noted that the state legislature is presumed to have acted within its constitutional power despite the fact that, in practice, its laws may result in some inequality. *Lindsey*, 405 U.S. at 71, citing *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1965).

In the present case, some tenants may be disadvantaged by having to deposit rents as a form of security pending trial. This in itself is not a violation of equal protection if the alleged disparity is reasonably related to a legitimate state purpose. To determine whether the disparate treatment of possessory tenants was reasonably related to a legitimate state purpose, the *Lindsey* Court examined the unique nature of the landlord-tenant relationship:

> The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for that would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether the tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property.

Lindsey, 405 U.S. at 72-73. The Court held that conditioning a continuance of the trial on a tenant's deposit of rent in an amount which directly corresponded to the landlord's potential damages was rationally related to the legitimate state goal of the "rapid and peaceful settlement" of landlord-tenant disputes.

The *Lindsey* Court held invalid another portion of the Oregon statute which required a tenant who wished to appeal from an adverse ruling to post a bond for twice the amount of rent expected to accrue pending the appellate decision and to forfeit the entire double-bond in the event the lower court decision was affirmed. The Court found that the double-bond requirement arbitrarily discriminated against appealing tenants and bore no reasonable relationship to any valid state objective because it was unrelated to actual rent accrued or specific damage sustained by the landlord. *Lindsey v. Normet*, 405 U.S. at 77.

The same considerations underlie the Hawaii Rent Trust Fund Statute. Prior to the establishment of the Rent Trust Fund Statute in Hawaii, landlords who obtained a judgment for possession were often unable to even recover the rent accrued before and during the summary possession trial which was often a lengthy and costly proceeding. At the same time, unscrupulous tenants were unjustly enriched by being allowed to occupy the premises rent-free until evicted.

By enacting the Rent Trust Fund Statute, the Legislature intended to create a mechanism for a speedy and peaceful resolution of disputes over the nonpayment of rent while minimizing the harm to both landlords and tenants. Requiring a tenant to deposit rents as a form of security pending the adjudication of possessory rights achieves this legitimate State objective. Unlike the double-bond requirement which was held invalid in *Lindsey*, the amount to be deposited into the rent trust fund, which is the amount tenant promised to pay under the lease, bears a direct correlation to the landlord's actual damages.

The facts of the present case dramatically illustrate the problems faced by landlords. Respondent filed its summary possession action on June 28, 1990. Over the next several months, Petitioners employed numerous delaying tactics that enabled them to operate their business out of Respondent's property rent-free. Although Respondent's motion to establish a rent trust fund was orally granted in August 1990, Petitioners delayed the entry of the order so that it was not until October 9, 1990, the date of trial, that a writ of possession issued. By the

time Respondent actually recovered possession in 1991, Petitioners owed more than $245,000.00 in back rent.

CONCLUSION

The Hawaii Rent Trust Fund Statute is constitutional both on its face and as applied because it preserves the notice and hearing requirements of procedural due process and is reasonably related to legitimate state objectives as required by the Equal Protection Clause. Respondent, therefore, respectfully requests this Court to find that the Hawaii statute is constitutional, and to deny the Petition for a Writ of Certiorari.

DATED: Honolulu, Hawaii, December 17, 1992.

Roy T. Ogawa
600 Ocean View Center
707 Richards Street
Honolulu, Hawaii 96813
(808) 533-3999

Counsel for Respondent
Pauahi Associates

APPENDIX 1

NO. 14881

IN THE SUPREME COURT OF THE
STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership, Plaintiff-Appellee, vs. MAYFLOWER INTERNATIONAL COMPANY, DBA HONSEW, INC., a Hawaii General Partnership; HONSEW, INC., a Hawaii corporation; TSUNG HAI LIN aka THEODORE T. H. LIN; and MAY KWONG, Defendants-Appellants.	CIV. NO. H90-2900

ORDER

(Filed Nov. 24, 1992)

Upon consideration of Plaintiff-Appellee Pauahi Associates, a Hawaii General Partnership's Verified Bill of Costs, the papers in support, and there being no opposition thereto,

IT IS HEREBY ORDERED, pursuant to Rule 39 of the Hawaii Rules of Appellate Procedure, that Pauahi Associates, a Hawaii General Partnership is awarded $613.00 in costs to be borne by Defendants-Appellants Mayflower International Company, dba HONSEW, INC., a Hawaii

General Partnership; HONSEW, INC., a Hawaii Corporation; TSUNG HAI LIN aka THEODORE T. H. LIN; and MAY KWONG.

DATED: Honolulu, Hawaii, November 24, 1992.

/s/ Steven H. Levinson [SEAL]
Associate Justice

APPENDIX 2

NO. 14881

IN THE SUPREME COURT OF THE
STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Plaintiff-Appellee,

vs.

MAYFLOWER INTERNATIONAL COMPANY, dba HONSEW, INC., a Hawaii General Partnership; HONSEW, INC., a Hawaii Corporation; TSUNG HAI LIN aka THEODORE T.H. LIN; and MAY KWONG,

Defendants-Appellants.

CIVIL NO. H90-2900

APPEAL FROM:

1) DENIAL OF DEFENDANTS' DEMAND FOR TRIAL BY JURY, JULY 20, 1990;

2) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS COMPLAINT OR TO TRANSFER ACTION TO FIRST CIRCUIT COURT, OR TO STAY ALL PROCEEDINGS, JULY 30, 1990;

3) ORDER GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM THE ORAL ORDER GRANTING PLAINTIFF'S MOTION FOR ESTABLISHMENT OF RENT TRUST FUND, OCTOBER 9, 1990;

)	4) ORDER GRANTING
)	PLAINTIFF'S EX PARTE
)	MOTION FOR
)	ISSUANCE OF
)	JUDGMENT FOR
)	POSSESSION AND
)	WRIT OF POSSESSION,
)	OCTOBER 9, 1990;
)	
)	5) JUDGMENT FOR
)	POSSESSION,
)	OCTOBER 9, 1990;
)	AND
)	
)	DISTRICT COURT OF
)	THE FIRST CIRCUIT
)	
)	HONORABLE FRANCIS
)	I. YAMASHITA
)	
)	HONORABLE DAVID
)	K. NAMAKA
)	
)	HONORABLE TANY S.
)	HONG
)	
)	Judges
)	(Filed Dec. 11, 1992)

JUDGMENT ON APPEAL
CERTIFICATE OF SERVICE

Of Counsel:
OLIVER, LAU, LAWHN & OGAWA
Attorneys at Law
A Law Corporation

ROY T. OGAWA 1821-0
A DEBBIE JEW 3213-0
707 Richards Street
Suite 600
Honolulu, Hawaii 96813
Attorneys for Plaintiff-Appellee

NO. 14881

IN THE SUPREME COURT OF THE
STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Plaintiff-Appellee,

vs.

MAYFLOWER INTERNATIONAL COMPANY, dba HONSEW, INC., a Hawaii General Partnership; HONSEW, INC., a Hawaii Corporation; TSUNG HAI LIN aka THEODORE T.H. LIN; and MAY KWONG,

Defendants-Appellants.

CIVIL NO. H90-2900

APPEAL FROM:

1) DENIAL OF DEFENDANTS' DEMAND FOR TRIAL BY JURY, JULY 20, 1990;

2) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS COMPLAINT OR TO TRANSFER ACTION TO FIRST CIRCUIT COURT, OR TO STAY ALL PROCEEDINGS, JULY 30, 1990;

3) ORDER GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM THE ORAL ORDER GRANTING PLAINTIFF'S MOTION FOR ESTABLISHMENT OF RENT TRUST FUND, OCTOBER 9, 1990;

4) ORDER GRANTING PLAINTIFF'S EX PARTE MOTION FOR ISSUANCE OF JUDGMENT FOR POSSESSION AND WRIT OF POSSESSION, OCTOBER 9, 1990;

)	5) JUDGMENT FOR POSSESSION, OCTOBER 9, 1990; AND
)	DISTRICT COURT OF THE FIRST CIRCUIT
)	HONORABLE FRANCIS I. YAMASHITA
)	HONORABLE DAVID K. NAMAKA
)	HONORABLE TANY S. HONG
)	Judges

JUDGMENT ON APPEAL

Pursuant to the memorandum opinion of the Supreme Court of the State of Hawaii filed herein on August 26, 1992, the District Court's judgment for possession is affirmed on all particulars.

DATED: Honolulu, Hawaii, DEC 11 1992.

BY ORDER OF THE COURT:

/s/ Eugene L. Sabado
CLERK

APPROVED:

/s/ Steven H. Levinson
JUSTICE

[SEAL]

NO. 14881

IN THE SUPREME COURT OF THE
STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Plaintiff-Appellee,

vs.

MAYFLOWER INTERNATIONAL COMPANY, dba HONSEW, INC., a Hawaii General Partnership; HONSEW, INC., a Hawaii Corporation; TSUNG HAI LIN aka THEODORE T.H. LIN; and MAY KWONG,

Defendants-Appellants.

CIVIL NO. H90-2900

APPEAL FROM:

1) DENIAL OF DEFENDANTS' DEMAND FOR TRIAL BY JURY, JULY 20, 1990;

2) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS COMPLAINT OR TO TRANSFER ACTION TO FIRST CIRCUIT COURT, OR TO STAY ALL PROCEEDINGS, JULY 30, 1990;

3) ORDER GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM THE ORAL ORDER GRANTING PLAINTIFF'S MOTION FOR ESTABLISHMENT OF RENT TRUST FUND, OCTOBER 9, 1990;

)	4) ORDER GRANTING
)	PLAINTIFF'S EX PARTE
)	MOTION FOR
)	ISSUANCE OF
)	*JUDGMENT FOR*
)	POSSESSION AND
)	WRIT OF POSSESSION,
)	OCTOBER 9, 1990;
)	
)	5) JUDGMENT FOR
)	POSSESSION,
)	OCTOBER 9, 1990;
)	AND
)	
)	DISTRICT COURT OF
)	THE FIRST CIRCUIT
)	
)	HONORABLE FRANCIS
)	I. YAMASHITA
)	
)	HONORABLE DAVID
)	K. NAMAKA
)	
)	HONORABLE TANY S.
)	HONG
)	
)	Judges

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing judgment on Appeal was duly served by hand delivery upon the following at their last known address on October 27, 1992.

GARY VICTOR DUBIN, ESQ.
Seven Waterfront Plaza
Suite 400
500 Ala Moana Boulevard
Honolulu, Hawaii 96813

Attorney for Defendants-Appellants

DATED: Honolulu, Hawaii, OCT 27 1992.

/s/ A. Debbie Jew
ROY T. OGAWA
A. DEBBIE JEW
Attorneys for Plaintiff-Appellee

Of Counsel:
OLIVER, LAU, LAWHN
& OGAWA

APPENDIX 3

PERMISSION TO COPY DENIED HRS 606-13 AND OTHER RULES OF COURT

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership, Plaintiff, vs. MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii General Partnership, HONSEW, INC., a Hawaii Corporation, TSUNG HAI LIN aka THEODORE T. H. LIN and MAY KWONG, Defendants, and JACKSON PACIFIC JOINT VENTURE dba JACKSON CONTRACTORS, a Hawaii Registered General partnership, Intervenor.	)	Civil No. H90-2900

TRANSCRIPT

of proceedings had before the Honorable Francis I. Yamashita, Judge Presiding, on Monday, the 9th day of day of July, 1990.

OLIVER, LEE,
LAWHN, OGAWA & LAU

ROY T. OGAWA,
600 Ocean View Center
707 Richards Street
Honolulu, Hawaii 96813

Attorneys for Plaintiffs,

GARY VICTOR DUBIN,
Suite 1915
733 Bishop Street
Honolulu, Hawaii 96813

Attorney for Defendants,

CADES, SHUTTE,
FLEMING & WRIGHT

LORRAINE AKIBA,
1000 Bishop Street
12th Floor
Honolulu, Hawaii 96813

Attorneys for Intervenor.

REPORTED BY:

MARILYNNE J GRILHO CSR#217
Court Reporter
District Court of
the First Circuit
State of Hawaii

[p. 3] (Case called)

MR. OGAWA: Good afternoon, Your Honor.

Roy Ogawa on behalf of the plaintiffs. Your Honor, at this time we'd just like to take a default against May Kwong and Mayflower International, the general partnership.

There was a problem with service, and we re-served Mr. Lin and Hosew, Inc. So only those two are here for return today.

THE COURT: All right. Default judgment as to Mayflower International partnership and May Kwong. Continue as to service –

MR. OGAWA: Your Honor, that service is now set for July 16th at 1:30.

THE COURT: July 16th. Default, Judgment for Possession, Writ of Possession to issue. Continue the matters for proof – for disposition to July 16th, then you can set proof at that time. How's that?

MR. OGAWA: Yes. Well, technically, Your Honor, we can't have judgment for possession yet, without the other defendants.

THE COURT: Well, that's why I'm continuing the whole thing. Okay.

MR. OGAWA: Thank you, Your Honor.

APPENDIX 4

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership, Plaintiff, vs. MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii General Partnership, HONSEW, INC., a Hawaii Corporation, TSUNG HAI LIN aka THEODORE T.H. LIN and MAY KWONG, Defendants, and JACKSON PACIFIC JOINT VENTURE dba JACKSON CONTRACTORS, a Hawaii Registered General Partnership, Intervenor.	Civil No. H90-2900

TRANSCRIPT

of proceedings had before the Honorable Tany S. Hong, Judge Presiding, on Monday, the 30th day of July, 1990.

OLIVER, LEE, LAWHN,
OGAWA & LAU — Attorneys for Plaintiffs,

ROY T. OGAWA,
600 Ocean View Center
707 Richards Street
Honolulu, Hawaii 96813

GARY VICTOR DUBIN,
Suite 1915
733 Bishop Street
Honolulu, Hawaii 96813 — Attorney for Defendants,

CADES, SCHUTTE,
FLEMING & WRIGHT — Attorneys for Intervenor.

LORRAINE AKIBA,
1000 Bishop Street
12th Floor
Honolulu, Hawaii 96813

REPORTED BY:

MARILYNNE J GRILHO CSR 217
Court Reporter
District Court of
the First Circuit
State of Hawaii

* * *

[p. 43] failed to raise a compulsory counterclaim, whether or not the counterclaim was waived – whether or not that applies to summary possession cases, Mr. Dubin, I think is stretching a reading of those cases.

As far as the Court is concerned, there has been no waiver of Mr. Ogawa's so-called compulsory counterclaim. This is a summary possession action.

So as far as the Court is concerned, the issues you raise in your memorandum: 1 is denied. 2 is also denied.

3 is granted. 4 is granted. With respect to your alternative argument, the stay of proceedings, that is also denied.

Which brings us now to the question relating to the amount of the rent that is going to go into the rent trust fund. Inasmuch as it's almost 12 o'clock – yes, Mr. Ogawa?

MR. OGAWA: I'd just like some clarification for the record. With respect to 3 and 4, my understanding is 3 is with respect to jurisdictional amount.

THE COURT: Yes. It's granted with respect to jurisdictional amount.

MR. OGAWA: Only for determination of amount of damages?

THE COURT: That is correct.

MR. OGAWA: And 4 is granted with respect [p. 44] to the guarantors' liability?

THE COURT: That is correct. It's my understanding you've made a demand for jury trial as to all issues – I think what you have to do is clarify your demand. I think the requirement is that you specify which items are – or which issues in dispute should go up to the Circuit Court, Mr. Dubin.

But I presume that what you're talking about is with respect to liability of the guarantors, and then with respect to the issue of damages relating to all damages arising out of the leasehold, as well as the issue as to the amounts of rent due and owing.

MR. DUBIN: I think the issue as to the guarantors went to jurisdiction, not to transfer, but to dismiss

the issue on damages. It goes to the amount of jurisdiction, not the issue of –

THE COURT: Well, I'm not going to dismiss it. I'm going to simply transfer it and let the court make a determination on your –

MR. DUBIN: Can I bring up a housekeeping matter. The original complaint was first served on my client's wife who is a guarantor. Default was taken against her and the general partnership. And it seems a waste of time now to file a motion to set aside the default so that –

THE COURT: No. You'll have to file your [p. 45] motion, Mr. Dubin. I can't handle it orally. I'm sorry.

MR. DUBIN: I was hoping Mr. Ogawa would cooperate and –

THE COURT: Mr. Ogawa?

MR. OGAWA: Your Honor –

THE COURT: I'll leave it to Mr. Ogawa.

MR. OGAWA: – I've indicated to Mr. Dubin on several occasions that if he – at the time when he prepares his client's affidavit as to the reasons why she didn't show up, why she didn't contact him, what the defenses are, we'd at that time make our determination.

He kept asking me, and I kept telling him, file the affidavit and move, and we'll determine whether we'll agree with it or not.

THE COURT: All right. File the motion, Mr. Dubin.

And as I indicated, it's almost 12 o'clock. I'm prepared to do the following: Recess, because we do have a trial date set for Thursday afternoon, I believe. Is that correct?

Maybe we can use that Thursday afternoon to make a determination as to your motion for reconsideration. Make a determination as to the amount of rent due and owing.

* * *

APPENDIX 5

Hawaii District Court Rules of Civil Procedure

RULE 5. SERVICE AND FILINGS OF PLEADINGS AND OTHER PAPERS.

(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, brief or memorandum of law, offer of judgment, bill of costs, designation of record on appeal, and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be

served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) (Reserved)

(d) Filing. Except as provided in subdivision (f) of this rule, all papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

(e) Filing With The Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(f) Nonfiling of Discovery Materials. A deposition, interrogatory, request for discovery production or inspection, request for documents, request for admissions, and answers and responses thereto shall not be filed automatically with the court; provided that on a motion or at trial any such document shall be filed when offered in evidence or submitted as an exhibit; and further provided that a deposition taken outside this state or a deposition taken by an officer who is discontinuing the occupation of taking depositions shall be promptly filed pursuant to Rule 30(f)(1). In addition the court may at any time, on ex parte request or sua sponte, order the filing of any discovery material.

(Amended March 16, 1984, partly effective March 16, 1984, fully effective May 1, 1984.)

(3)

No. 92-905

Supreme
DEC 28 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii Corporation, TSUNG HAI LIN aka THEODORE T.H. LIN and MAY KWONG,

Petitioners,

vs.

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court Of The State of Hawaii

BRIEF OF THE STATE OF HAWAII AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
*Counsel of Record

Department of the
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
*Attorneys for the
State of Hawaii*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

No. 92-905

In The

Supreme Court of the United States

October Term, 1992

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii Corporation, TSUNG HAI LIN aka THEODORE T.H. LIN and MAY KWONG,

Petitioners,

vs.

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court Of The State of Hawaii

BRIEF OF THE STATE OF HAWAII AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

Section 666-21 of the Hawaii Revised Statutes, known as the Hawaii Rent Trust Fund Statute, affects the public interest in low-cost rental property, by providing, on notice and opportunity to be heard, the establishment of secured funds in the state District Court, out of which disputed rental amounts may be paid at the conclusion of Hawaii's "summary possession" proceeding. Although the failure to comply with an order directing the payment of trust amounts constitutes, in effect, a default under the

summary possession statute, tenant litigants do have, prior to the issuance of an order directing payment of trust fund amounts, the full opportunity to contest before the state District Court both the amounts genuinely in dispute under the lease and whether the lease allows rent to be withheld while the tenant remains in possession. Because the Trust Fund law is an essential part of Hawaii's definition of the landlord's interest in its fee, and provides, in narrowly drawn fashion, a critical benefit to Hawaii tenants who *do* pay their rent on time – namely a rental market which is not inflated by costs of more expensive eviction procedures – the State of Hawaii has an important interest in this case. Indeed, under 28 U.S.C. § 2403(b), Hawaii would be entitled to intervene in this case, now that it is in a court of the United States. In the interest of expediting consideration of this Petition, however, Hawaii files this amicus curiae brief in support of Respondent, and requests that, if certiorari is granted, the Court issue an order pursuant to 28 U.S.C. § 2403(b) allowing the State of Hawaii to file a brief as a respondent and to participate in argument.

REASONS FOR DENYING THE WRIT

1. Petitioners have fundamentally misconstrued the nature of remedies afforded by Haw. Rev. Stat. § 666-21, in seeking to manufacture a substantial federal question where none exists. Section 666-21, prior to effecting any "deprivation" against a tenant, permits a full blown adversary and evidentiary hearing on the amounts of "any disputed rent," as well as the defenses of payment and the existence of "a written instrument agreeing that

the rent could be withheld or deducted" without yielding up possession. Under Hawaii law, moreover, implied terms, such as the warranty of habitability, are deemed part of the "written instrument," and therefore all bases for withholding rent and remaining in possession are sufficiently at issue – if pressed – at the stage where the trust fund is established. *See Quedding v. Arisumi Brothers, Inc.*, 66 Haw. 335, 338, 661 P.2d 706, 709 (1983) (per curiam) (quoting *City and County v. Kam*, 48 Haw. 349, 355, 401 P.2d 683, 687 (1965)). Moreover, to the extent Petitioners are raising a facial challenge, they are bound to demonstrate "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). This Petitioners do not even try to do.

2. As applied to this case, the Rent Trust Fund Statute operates similarly to the preliminary possession procedure at issue in *Lindsey v. Normet*, 405 U.S. 56 (1972). The justification for that procedure – the abolition of the common law right to resort to self-help to evict a non-paying tenant – is equally applicable in Hawaii, which has adopted "[t]he common law of England," except as provided otherwise by the laws of the United States, the constitution and statutes, or precedents, custom, or usage antedating the annexation of Hawaii by the United States. Haw. Rev. Stat. § 1-1. Petitioners, it should be stressed, could have avoided all resort to summary possession by providing, explicitly, in the lease at issue for the right to withhold payments for the reasons Petitioners asserted below (but do not identify at this stage). This they did not do either.

3. The issue of whether the agreement permitted the tenants to remain in possession was adequately litigated below, and there is no basis in federal law for review of the findings adverse to Petitioners here. Accordingly, there is no basis for review of any question whether adequate "process" was given. As in *Lindsey*, Hawaii provides pre-deprivation process on what are in effect the issues of possession, *see* 405 U.S. at 72, and this Court should not grant review to determine the subsidiary issues of state law here, namely, what does and does not constitute an implied justification for withholding rent while remaining in possession. *See Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2901 (1992) ("background principles" of state law not appropriate for review in the federal courts).

4. Petitioners' equal protection challenges are of no greater moment, for this Court has already determined that it is permissible to treat landlord-tenant matters differently from other sorts of litigation. *See Lindsey*, 405 U.S. at 74-79.

CONCLUSION

For the foregoing reasons and those stated by Respondent, the writ should be denied. Should the Court grant the writ, it should treat this Brief as a motion for leave to intervene under 28 U.S.C § 2403(b), permit the State of Hawaii to file a brief as respondent, and allow the State of Hawaii to provide argument on the federal issues here.

Dated: Honolulu, Hawaii, December 24, 1992.

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
*Counsel of Record

Department of the
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
Attorneys for the
State of Hawaii

Supreme Court, U.S.
FILED
JAN 6 1993
OFFICE OF THE CLERK

No. 92-905

In The

Supreme Court of the United States

October Term, 1992

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii Corporation; TSUNG HAI LIN aka THEODORE T. H. LIN and MAY KWONG,

Petitioners,

vs.

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONERS' REPLY BRIEF

GARY VICTOR DUBIN
Counsel for Petitioners
Seven Waterfront Plaza
Suite 400
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
(808) 537-2300

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Points In Reply 2

Conclusion 5

TABLE OF AUTHORITIES

Page

Fuentes v. Shevin, 407 U.S. 67 (1972)..... 5

Lindsey v. Normet, 405 U.S. 56 (1972)..... 5

TABLE OF APPENDICES

Appendix 5: Docket Sheet, District Court, Hawaii, Civil No. H90-2900.....App. 1

Appendix 6: Transcript of Proceedings, August 2, 1990, Civil No. H90-2900.....App. 3

Appendix 7: Transcript of Proceedings, August 29, 1990, Civil No. H90-2900.....App. 8

No. 92-905

In The

Supreme Court of the United States

October Term, 1992

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii Corporation; TSUNG HAI LIN aka THEODORE T. H. LIN and MAY KWONG,

Petitioners,

vs.

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONERS' REPLY BRIEF

Two Opposition Briefs were filed in this proceeding on or about December 24, 1992, much of the contents of which misstates the record below; since the opposition papers present identical argument, this single Reply Brief is submitted by Petitioners to correct the errors presented in both Opposition Briefs, addressing only new arguments therein raised, pursuant to Rule 15.6.

Additional materials are set forth in the Appendix to the Reply Brief, were needed, to document the misstatements in the Opposition Briefs.

POINTS IN REPLY

1. Respondent alleges that the Petition was filed before the Judgment below was final (Resp. Brief, at 1), suggesting that the Petition should not be considered. Respondent is obviously unfamiliar with Rule 13.4, which starts the clock from the judgment and not the mandate. The opinion of the Hawaii Supreme Court challenged was entered on August 26, 1992 (see Petition, App. 5), which does not take into account Respondent's failure to have secured the mandate in a timely manner.

2. Respondent alleges that Mayflower International Company, as well as May Kwong, has no standing, as they were defaulted, supposedly by the state district court at the start of the summary possession proceedings (Resp. Brief, at 1). The Court will note that that issue was not even raised in the State Appeal or considered by the Hawaii Supreme Court in its decision, for the reason, first, that the dual service on Ms. Kwong, who has no facility with English, was considered ineffective, and became irrelevant since not only was she as a guarantor not subject to the subject matter jurisdiction of the state district court due to its dollar limitation, but it was known and established by this very Respondent below that the lease in question had been assigned with the consent of Respondent to Mayflower's corporation, Honsew, which did make an appearance, which has standing to bring this challenge as it was recognized to have had the right to do not only by the Hawaii Supreme Court but also by the state district court that recognized its standing as an approved assignee (see Docket Sheet of state district court, July 9, 1990, and July 16, 1990, Appendix 5; and Transcript of Proceedings before state district court,

August 2, 1990, Appendix 6 highlighting the standing of the assignee Honsew).

3. Respondent and Amicus Curiae allege that the procedures below *did* afford Petitioners "notice and an opportunity to be heard" in a "full blown adversary and evidentiary hearing" and that "the rent trust fund deposits are not a precondition to a trial on the merits" (Resp. Brief, at 2, 3, and 12); A.C. Brief, at 2, 3). The offending Statute, however, provides for no *pre*consideration of offsets or defenses, as the Hawaii Supreme Court in its decision authoritatively determined. It is not sufficient, surely, to merely hold a hearing, when all that can be determined is if the rent has been paid, and Petitioners' counsel even went so far below to beg the state district court merely to hold the deposit hearing and the "subsequent" offset and defenses hearing at the same time, and even that was refused, the state district court, with more candor than Respondent or the Amicus Curiae, explaining that it has no authority to consider *any* substantive defenses unless and until the deposit was made (see Transcript of Proceedings before state district court, August 29, 1990, Appendix 7 to Reply Brief). The trial judge explains that he would not even listen to offset and defense claims *after* the money was deposited since Petitioners had elected a jury trial that meant that issue had to go to a higher trial court, which compounds the constitutional infirmity still further – to punish the tenant who elects his constitutional right to trial by jury.

4. Respondent and Amicus Curiae allege that the lease prevents Petitioners from asking for offsets to rent payments, and even that unfinished premises were not grounds for breach of the lease, presumably as summary

judgment matters, even though not considered that way by the state courts (Resp. Brief, at 4; A.C. Brief, at 3); however, the Hawaii Supreme Court in its decision took none of those issues into consideration; they are factual matters that themselves cannot be determined except by some trial on the merits, even in Hawaii, and when one signs a lease, whether a contract of adhesion or not, there is surely no waiver of fundamental due process rights as to the adjudicatory process that will decide such disputes. For example, Petitioners claim that the leasehold improvements written into the lease should have been reimbursed to them, not as an offset, but as a part of the rent bargained for (see Petition, at 3), and that itself should have been a rent issue to be decided before the deposit was ordered, but was also ignored.

5. Respondent and Amicus Curiae allege that for sound policy reasons States can "treat landlord-tenant matters differently", to protect "the public interest in low-cost rental property" and that to do otherwise here might allow tenants to "remain in possession of the landlord's property for a substantial period of time without paying rents" (Resp. Brief, at 3; A.C. Brief, at 4, 1). Obviously, $22,153.20 per month in rent is not low-income housing (see Petition, App. 2); moreover, since the purpose of state district court summary possession laws is to allow quick adjudication, Respondent fails to explain why instead of proceeding to trial in a few weeks as with most summary possession claims it instead took months to pursue the rent trust fund deposit, at its own procedural election, as the Plaintiff below. If the quickness of remedy were to be a justification for due process violations, the Fifth and Fourteenth Amendments would have

as much vitality as did the individual liberties enshrined within the former Soviet Union's written Constitution.

CONCLUSION

The Hawaii Supreme Court in its August 26, 1992, opinion, was clearly more forthright than the opposition papers here, for it covered the issues with no such *adversarial gloss*, giving a clear interpretation to the Hawaii Rent Trust Fund Statute, holding that "the right to summary possession is distinct from the issue of a tenant's defenses and claims of offsets to claimed rent" (see Petition, App. 9), which is the exact opposite of what this Court in *Fuentes v. Shevin*, 407 U.S. 67, 85 n.15 (1972), felt the need after its prior ruling in *Lindsey v. Normet*, 405 U.S. 56 (1972), to point out.

Respectfully submitted,

GARY VICTOR DUBIN

Counsel for Petitioners

Honolulu, Hawaii
January 4, 1993

APPENDIX 5

DOCKET FILE CIVIL DOCKET
DISTRICT COURT OF THE

NO. H90-2900

FIRST CIRCUIT

DEFENDANT(S):

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii General Partnership, HONSEW, INC., a Hawaii corporation, TSUNG HAI LIN aka THEODORE T. H. LIN and MAY KWONG and JACKSON PACIFIC JOINT VENTURE dba JACKSON CONTRACTORS, Intervenor

Attorney: LORRAINE H. AKIBA for INTERVENOR
GARY DUBIN for ALL DEFTS (7/16/90)

PLAINTIFF(S):

PAUAHI ASSOCIATES, a Hawaii General Partnership

Attorney: Roy Ogawa #1821

CAUSE OF ACTION: AMOUNT EXHIBIT

ASSUMPSIT
SUMM. POSS. DMGS. $93,720.88 LEASE AGREEMENT

Pauahi Project-Block E, kaa Maunakea Marketplace TMK #1-7-3: 196
DATE FILED 6/28/90
FILING COST 15.00ck
CLERK em

SUMMONS: RETURNED 7/2/90 SERVED ON all: 6/30/90

MAYFLOWER: 3269 Harding Ave., srvd thru May Kwong, V.P.

HONSEW: 3269 Harding Ave., thru May Kwong, V.P.

TSUNG HAI LIN: 3269 Harding Ave. thru his adult roomate, May Kwong residing therein at his normal place of abode since the deft could not be found

MAY KWONG: 3269:Harding Ave.

July 9 Atty Roy Ogawa present for Pltff. Defts called; default noted re MAYFLOWER INTERNATIONAL COMPANY DBA HONSEW, INC., a Hawaii General Partnership and MAY KWONG per Atty Ogawa. Other defts have been reserved & the retble date is 7/16/90 P.M. By order of the crt, case continued to: 7/16/90 P.M. for ANSWER re OTHERS & DISPOSITION re MAYFLOWER INTERNATIONAL & MAY KWONG. Tape RC475; #1-1242. YAMASHITA/csl

July 16 YAMASHITA:KAU: (Tape RC476)
Atty Ogawa for Pltff & Atty Dubin for all Defts present. General Denial Entered for Defts, HONSEW & TSUNG HAI LIN. Case cont for PRE-TRIAL as to HONSEW & TSUNG H. LIN to 7/23/90 at 9:00 AM. Atty Dubin given leave to file written Answer & Counterclaim. Lorraine Akiba present for Intervenor Jackson Contractors – Given leave to file for Intervention.

APPENDIX 6

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership, Plaintiff, vs MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii General Partnerhsip, HONSEW, INC. a Hawaii Corporation, TSUNG HAI LIN aka THEODORE T.H. LIN and MAY KWONG, Defendants. and JACKSON PACIFIC JOINT VENTURE DBA JACKSON CONTRACTORS, a Hawaii Registered General Partnership, Intervenor.	Civil No. H90-2900

TRANSCRIPT

of proceedings had before the Honorable Tany S. Hong, Judge Presiding, on Thursday, the 2nd day of August, 1990.

Of Counsel:

OLIVER, LEE, LAWHN, OGAWA & LAU

ROY T. OGAWA
600 Ocean View Center
707 Richards Street
Honolulu, Hawaii 96813

Attorneys for Plaintiffs,

GARY VICTOR DUBIN
Suite 1915
733 Bishop Street
Honolulu, Hawaii 96813

Attorney for Defendants,

CADES SCHUTTE FLEMING & WRIGHT

BRIAN YOKOTA
1000 Bishop Street
12th Floor
Honolulu, Hawaii 96813

Attorneys for Intervenor.

REPORTED BY:

MARILYNNE J GRILHO CSR#217
Court Reporter
District Court of the First Circuit
State of Hawaii

* * *

BY MR. OGAWA:

Q Mr. Lin, could you state your full legal name for the record?

A Theodore Tsung Hai Lin.

Q And did you officially change your name to Theodore, or is that an alias that you use?

A That's my legal name.

Q Given name?

A It's my all chosen (sic) name. My original name when I emigrate here was Tsung Hai Lin. Then I would become a citizen, so I add American name to it.

Q So your naturalization papers will show Theodore Tsung Hai Lin?

A Correct.

Q What's your date of birth?

A February 8, '57.

Q Mr. Lin, are you a general partner of the defendant Mayflower International Company?

A I was. Well, I guess I got to describe this little bit, because me and my wife May Kwong, we were general partners back in five, six years ago when we first set up Mayflower International. And we incorporate the company to Honsew. The Honsew buys out Mayflower completely. And I own 100% of Honsew, Inc. at that point, and my wife doesn't own anything of the share in the company stock.

Q And what happened to her interest in Mayflower International? Did you buy her out?

A Oh, yes. At that point, yes.

Q Mr. Lin, I'll show you what's been marked and introduced into evidence as plaintiff exhibit 3, which

purports to be an assignment of lease between Mayflower International Company and Honsew, Inc. Now directing your attention to page 2 of the assignment of lease, is that your signature made on behalf of Mayflower International Company?

A Yes.

Q And also referring to the signature under the line Honsew, Inc. on page 2, is that your signature made on behalf of Honsew, Inc.?

A Yes.

Q And did Mayflower International Company assign the Maunakea marketplace lease to Honsew, Inc.?

A Well, when Pauahi Associates prepare the lease, they put two names at the same time on lease, so there wasn't any assignment from Mayflower to Honsew at all, because I believe – what I know, both of them were (sic) appear on the lease.

Q But you signed this assignment of lease, purporting to assign the lease from Mayflower International Company to Honsew, Inc., is that correct?

A Can I see one – this the one here? Well, yes.

Q Are you an officer or director of Honsew, Inc.?

A I am the president.

Q And you're also the 100% stockholder?

A Yes.

Q Who are the other officers and directors for Honsew, Inc?

A That's – my sister in Japan is the vice president. And my sister-in-law in Hong Kong is the secretary.

Q And your wife May Kwong is not an officer or director of Honsew, Inc.?

A No.

Q And where do you presently reside?

A I'm sorry?

Q Where do you presently live?

A I live in 225 Kaiulani Avenue, apartment 1404. Zip code is 96815.

Q Now when we initially attempted to serve the complaint, we served it at the residence of your wife May Kwong. You no longer reside at that residence?

A Well, I move out of the house since more than a year ago, because we were in – weren't in good condition.

REPORTER: I'm sorry. What kind of condition?

A We – I mean the marriage was not in good condition. We were separated.

MR. OGAWA: Okay. Well, I'm not interested in the reason. I apologize, I don't mean to get into that.

Q But that used to be your residence, is that correct?

A Yes.

Q And when did you move out of that residence?

A I believe sometime last year. Around this time last year.

APPENDIX 7

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership, Plaintiff, vs. MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii General Partnership, HONSEW, INC., a Hawaii corporation, TSUNG HAI LIN, aka THEODORE T. H. LIN, and MAY KWONG, Defendants.	Civil No. H90-2900 Assumpsit, Damages, and Summary Possession (Filed Dec. 31, 1990)

TRANSCRIPT

of the proceedings before the HONORABLE TANY HONG, District Judge, presiding, on Wednesday, August 29, 1990.

APPEARANCES:

DEBBIE JEW, ESQ. — Attorney for Plaintiff
707 Richards Street
Suite 600
Honolulu, Hawaii 96813

GARY VICTOR DUBIN,
ESQ. Attorney for Defendants
733 Bishop Street
Suite 1915, Grosvenor Center
Honolulu, Hawaii 96813

INDEX

Defendants' witness	Redirect	Recross
Tsung Hai Lin	9	14

* * *

[p. 29] MR. DUBIN: All right. Then, the other issue, Your Honor, is that Section 666-21 of the Hawaii Revised Statutes, Rent Trust Fund, subsection c, does specifically provide that this Court, after the money – I'll wait until the Court gets the Section. Section 666-21(c).

THE COURT: Go ahead.

MR. DUBIN: Does provide that after this Court establishes the money shall be put in the rent trust fund, may specifically grant that money back to the tenant if it finds that the tenant had a basis to withhold, deduct, or, and this is either of two words, of course, otherwise offset or set off, I'm sorry, the rents not paid.

Now, based upon. . . .

(Reporter replenishes steno pad).

MR. DUBIN: We appreciate the fact that [p. 30] this Court did give us an evidentiary hearing where we were able to discuss these issues, although prevented, to some extent, introducing evidence on setoffs that we wanted to.

As the Court knows, I, frankly, find this Section to be constitutionally objectionable for the reason the cases the Hawaii Supreme Court on preliminary injunctions I have cited to the Court. It seems like this Section could be used for the purpose of ameliorating the constitutional problems that exist. And, I would ask the Court to permit us to have a hearing on this issue of offsets, 666-21(c), at the same time that the order would become effective, and to stay the order on the rent trust fund so that we would have the opportunity to present our evidence for setoffs to avoid a situation where any resident of the State, my client or otherwise, who did not have the money to put it up, but who had valid claims under 21 – 666-21(c), would have his day in court. And, as a matter of justice, would have the opportunity to show that he was entitled to the relief in Section 666-21(c).

If the Court were not to grant that request, then – then I feel that the constitutional infirmity of – of this Section would be clear. And, I think the Court has, I think, an obligation for two reasons to grant that request which, in effect, is, again, a stay.

One, because the Court should read – should attempt to read 666-21 in the way that it would be constitutionally [p. 31] consistent with the requirements of the preliminary injunction requirements and constitutional law in this state.

And then, secondly, the special circumstances of this case where, for example, the rent supposedly was not due in February and suit was not even brought until – until, I think, it was in this Court in June, which would suggest that there were special circumstances here.

And, I would, therefore, ask the Court to give us an opportunity to schedule a 666-21(c) hearing prior to the effectiveness of the rent trust fund order.

THE COURT: Miss Jews?

MS. JEW: Your Honor, Mr. Dubin, or I should say the Defendants, do not have either a counterclaim or complaint for offsets in this Court. So, the issue of offsets is not appropriately before this Court.

However, they're not going to be prejudiced because they've already filed those claims in the circuit court, and the issue of any offsets that have to be done, and – and we intend to defend those claims vigorously, should be determined by the circuit court, rather than having several proceedings on the same issue in several – in – in more than one case and in two different courts. That – that does not get to – that does not promote judicial economy.

Mr. Dubin and his clients will have their day to be heard on the offsets in circuit court. They removed those [p. 32] claims up to the circuit court. They have their complaint for declaratory relief up in the circuit court.

The only issue before this Court is what rents are due, what rents haven't been paid, and what should be deposited into the rent trust fund.

MR. DUBIN: Two points, Your Honor. I call your attention to District Court Rule. I believe 12A specifically says that affirmative defenses are maintained in a general denial. So, we have the affirmative defenses. And, the opposition has a list of our affirmative defenses, which – which included setoffs.

Second, the fact that there's a circuit court case pending is not – is not our doing. Now, why did the Supreme Court give my client the right to damages and to a jury trial?

We filed a circuit court action before this action, and it was no rush. I mean, no rush to – to file, and we filed that because of a constitutional right to that.

The scheme that was set up by the legislature on this 666-21, constitutionally or otherwise, forces us and the court and everybody else into a box whether – whether to act. It's not something we created and, certainly, it would be ludicrous to suggest for the reasons that I pointed out of the – of the extraordinary remedy of 666-21.

It would be ludicrous to suggest that any client or anybody in the State, who couldn't put up the money who had [p. 33] valid claims for offsets, could then lose their business or hundred employees out of business, and then wait later on to decide whether they had any damages, especially when one considers the high costs of pursuing a circuit court action.

So, if anything, the reasons presented by Miss Jew convinced me more than ever that 666-21 should be read in this manner, in this case, that we do have an opportunity to ameliorate the effects of that which, of course, would then – would then lead to a less multi – multiplicity. Because if that were done, then, there would be less reason for us to take – to take an appeal which is – which is simply our efforts to try to get the evidence of offsets in.

And, here is – here is a statutory scheme to allow us to do that if the Court would merely dovetail the two together for us.

MS. JEW: Your Honor, the other thing is in the Lease Agreement itself regarding the payment of rentals on Page 4, it also said that rents will be paid without any offsets or deductions. That's the clear language of the agreement between the parties.

MR. DUBIN: Again, Your Honor, that's not relevant, because Section 666-21(c) specifically provides that setoffs are to be taken into account for the rent trust fund.

And, therefore, I – I don't really think that Miss Jew is suggesting that this Lease will nullify that – that [p. 34] provisions of Section 666-21(c), where the legislature says they don't care whether or not the provision may be in there.

MS. JEW: Well, ...

MR. DUBIN: The point is it says you can show – in fact, the legislature said something more significant in 666-21(c). It says that the tenant should have the right to get the money back by showing that he withheld it for a good reason; that he had a basis for withholding.

THE COURT: Well, doesn't that run contrary to your argument? Before he gets it back he had to pay it in.

MR. DUBIN: Well, not necessarily, Your Honor. It depends on the circumstance . . . .

THE COURT: Well, that's what the language clearly implies that before you get it back, you gotta pay it in.

MR. DUBIN: Well, I think it's the order – well, you see, that's the issue. If – if that – if that's what the legislature is demanding, if that's what the court is going to enforce, then we would like to have a constitutional review of that because the fundamental unfairness of that. It has to be obvious to everybody in this room.

You're going to force somebody who has a valid setoff claim by first putting it in. And – and then, if you can't put it in, he never has the right to show that – that he has, in a circumstance like this, where he was financially injured [p. 35] by – by the – by the setoff, to show that he had a valid claim under – under 2 – 666-21(c).

Now, what are we really asking for? It's going to take a little time to prepare the order anyway. The Court has already invested time and listened to – to most – most of the evidence here.

I – I just feel, not only is it – is it appropriate in a case where there is a constitutional question here, but in all fairness it's – what possible delay could come about? It's going to take some time for the order to be signed anyway, and the Court has suggested there might be a couple of weeks before the money is to be put in. By that time – we've gone with such speed here in this Court. I mean, we were told the first week we'd have it, the rent trust fund hearing the second week. If – if we – if the Court continues at speeds at which, I'm not saying that it's – it's prejudiced, this is the way the scheme is set up here by the legislature. If the Court is to continue with the same equality, the speed at which it – it rushes, to protect the – to protect the landlord, to also protect the tenant under Section 666-21(c).

We could probably have two hearings one after another before the order would be signed anyway. Why – why – why should we wait on that technicality?

Certainly, the language does not say that. The language in any – I believe any court could read, especially [p. 36] in these – in the circumstance, that it could almost be done simultaneously. Surely, that's, in my opinion, that's – that's the answer to the constitutional concern.

My client is asking for nothing more than the evidence be heard to make a determination as to what is fair in this case and circumstances in this case. And, in fact, the legislature has provided this under (c). It would be a shame if we never got to (c).

And, certainly, I can't see any prejudice to a – to a landlord who claimed rent is not paid in February, who waited till June to file, and who now has to prepare an order anyway that could take a couple of weeks.

And, as the – as the Court knows, I think the rule here in this Court is as it is in the circuit court, that the order, you know, takes time and the order may not be final. And, we have a right to file a motion for reconsideration anyway, which – which would delay the effect of it. So, there's no game being played here to delay. There's no way that this request of mine would delay anything. It might shorten it because we're not opposed to this Court making this decision.

What we're asking is that we have the full benefit of the wisdom of this Court based upon all – all the evidence.

THE COURT: Well, Mr. Dubin, some of the arguments that you made are very interesting. The argument relating to fundamental unfairness may be true, but I think [p. 37] when you look at the statute and you look at the manner in which this statute was set up, and the law relating to the fact that the damage issue can always be appealed to the circuit court, I think is indicative of the fact that the court and the laws – the legislature's aware of the fact that they have two issues.

One relating to the question of possession, and that issue is an issue that, I think, was set up for the purposes of giving the landlord a quick remedy with respect to possession of the property.

With respect to the issue of setoffs, et cetera, et cetera, although there are – this language in 666-21 relating to the fact that the court may take jurisdiction over the issue of setoffs, it's my opinion that that is a situation where that comes into play, both parties are agreeable to having that issue resolved here in this court. If one of the parties or both of the parties wish to have the matter heard in circuit court, then the matter, I think, should be heard in circuit court.

And, the reason for it is because the issue relating to setoffs, is a much more complicated issue than the issue relating to the question of possession.

Obviously, if we're going to hear the issue of setoffs in this court, in a – in a – in a few weeks, then, what's going to happen is that one or both parties may be [p. 38] disadvantaged because they won't have the advantages you have in a big lawsuit involving a lot of money in the

circuit court where you have time in which to be able to depose the parties, et cetera, et cetera.

In this case, because of the shortness of time, the discovery process is not really available. And, if that's true, then I think we're running into a real big problem as to the fairness of proceeding on a complicated issue without giving one or both parties the opportunity to be able to prepare the defenses to that issue, Mr. Dubin, especially when one party is not agreeable to – to hearing that issue.

MR. DUBIN: I think there's some confusion, Your Honor. I'd like to point out two confusions. I – I understand what Your Honor is saying.

Let me first point out in *Lum v. Sun*, a Hawaii Supreme Court case, they were talking not about the rent trust fund. That's what we're talking about, setoffs here.

THE COURT: That is correct.

MR. DUBIN: They were talking about the fact that you can go try the damages in circuit court; you're staying here in possession. I think that you – there may be some confusion in suggesting that that tells us anything about the argument that I was making with Miss Jew, because it really doesn't.

Because here, specifically, as far as the rent trust [p. 39] fund is concerned, there is a provision in the statute that says we can consider setoffs. So, whereas what the Court said about this – this distinction in terms of the treatment of the case, possession versus damages, well, that may be true. In *Lum v. Sun*, that – that was really not – not the issue.

And, secondly, I think the Court may be misreading, to some extent, *Lum v. Sun* because – because the issue – the Court did not say in that case that you couldn't bring up the issue of setoff in the possession suit, because after all, the only thing that the landlord is saying is you haven't paid me the money.

Now, if you can show that the landlord owes you money, that's not the issue of damages for purpose of – of this circuit court suit. That's still between the parties on the – on the issue – on the issue of rent.

And, in fact, the Lum Court, as I recall at the conclusion of it, pointed out that the damage issue in the circuit court was not moot because of what happened – because of the – of the possession issue in the – in the district court.

So, I don't read *Lum* at all to suggest that we can't raise the issue of setoff. And, I think if the Court barred our evidence based upon setoff, which I thought the Court was doing based upon 666-21, if the Court barred our evidence regarding setoff based upon *Lum*, I would ask the Court [p. 40] to allow me a few days to brief that issue, and specifically *Lum v. Sun*, because I think the Court would find that contrary as stated in *Lum v. Sun*. And, I think if I got the record of that case as to what actually happened in this Court, in the district court, it would be clear. Because having that record, the Hawaii Supreme Court pointed out that the issue is rendered moot is by the District Court's ruling on *Lum* summary possession's claim. That, in fact, I believe that because of – of the – of Chapter 666, it forces the parties into arguing

the same thing. It forces the parties into arguing setoff. Not as – not as on the issue of damages.

But, what is protected under – under Hawaii District Court Rule 12A, which has the force of statutory law in this State, as an affirmative defense. An affirmative defense, of course, is different than a counterclaim.

So, I don't think – I don't think that's what the Court said at all in *Lum*. And – and, I'm sure it's not clear in *Lum*, but I think from the language of it, it would have to be in our favor because they rule that the circuit court damage suit was moot.

And, I think that's the box that the court would be forcing us into, because if the Court, on the basis of we won't listen to setoff, decided that summary possession should, and that's a different issue than the rent trust fund, of course, summary possession should go to the Plaintiff in this case, [p. 41] and then we were to appeal, then, I presume the Hawaii Supreme Court will tell me the same thing it told the other party when it said that – that the *Sun's* claim is rendered moot by the district court ruling.

MS. JEW: Your Honor, the circuit court case in this case is not moot. There's a complaint requesting damages based on all the allegations of offsets in the circuit court. Mr. Lin and the defendants will not be deprived of their day in court on those issues.

The issue here is the amount of rent which has to be paid. Even Mr. Lin testified that with the signing of the lease, even if the premises were not ready, he would have to pay rent. That was his testimony. That's also reflected

in the Lease Agreement, Section 3, Paragraph F. That there is a recognition that there is construction ongoing. And, that rent all – the landlord shall not be subject to any liability for the failure to give possession on the date.

For that matter, it's – it's both the agreements of the party and acknowledgement by the defendant that rent had to be paid.

And, the issue of offsets was specifically removed by the same defendant who filed the complaint in the circuit court as plaintiffs asking for offsets. They're asking – they're going to be – if – if they're allowed to ask for offsets here, it's going to be putting an issue that's before [p. 42] the court either by a complaint or counterclaim by these defendants. It's also going to promote several proceedings on the same issue.

And, what may end up happening is you're going to have all these diverse rulings which would create more confusion.

They moved the – the issue to circuit court. They filed the complaint in circuit court. That's where the issue should be tried.

MR. DUBIN: Your Honor, can I point out that we – we had to file in circuit court because, not only is there a jurisdictional limitation here, but our complaint in circuit court is for declaratory judgment. And, think – think – think of the folly of this were in circuit court asking for declaratory judgment that the Lease is unconscionable as to these provisions, whereby this Court – this Court is – presumably could proceed to – on the basis that, no, you can't look at setoff or anything else that

happened. This Court goes ahead and gives possession, and then the complaint for declaratory judgment is then, obviously, moot.

MR. JEW: No, Your Honor. The – although the complaint is labeled for declaratory judgment, there are several counts. Some sounding in breach of contracts, some in tort, and requesting damages. So, it's a little bit simplistic to say that it's just a complaint for declaratory action just because it's labeled.

[p. 43] We have to look at the substance of the complaint over the form. And, the request for offsets is specifically in that complaint for declaratory judgment, which includes other relief, and that's where the case should be tried with respect to the offsets.

MR. DUBIN: If I list for one example in our complaint in circuit court, we ask for a judicial declaration that Honsew is not in default of the Lease, and the guarantees, and the rent provisions. Now, ...

THE COURT: All right. Mr. Dubin, Miss Jew, I think I've heard enough. Mr. Lin, I'm really sorry. There's a lot at stake for you. I understand that. Your entire business, your entire career is at stake. But, my job is to call it the way I see it, Mr. Lin.

And, I see the statute as requiring you to make payments into the rent trust fund. It's only when the question arises as to payments out of the rent trust fund, the issue of setoffs come into play.

I don't hear the Plaintiff in this case asking for payments out of the rent trust fund. It goes into the rent trust fund.

Secondly, there's some question as to whether or not the Plaintiff in this case wants to hear the issue of setoffs in this case. And, my ruling is that if both parties – one of the parties do not wish to hear the issue of setoffs [p. 44] in this case, then the Court is not going to hear the issue of setoffs. It's going to go into the rent trust fund, payments anyway. And, the issue of damages has to be decided in the circuit court.

Your attorney has raised some issues relating to the constitutionality of sections like that because it forecloses you from being able to raise defenses that you may have as to the payments that you're supposed to make in this case.

Now there's some question as to whether or not he can appeal from my decision. But, there are other ways that he can go to the supreme court to stop me from doing what I'm doing. And, I'm pretty sure that your attorney is smart enough to be able to decide how to do that. It may be by way of a Writ of Prohibition, or something like that, to the supreme court to prevent, or to raise the issue as to whether or not this statute and the way the Court is construing the statute may be unconstitutional.

And, because he doesn't have a way to get to the Court, he may have another way of getting into the court. But, that's for your attorney to make a determination.

But, as far as I'm concerned, the Court's order stands. You have to make payment. One payment by the first of September. That's for the September rent. The balance has to be made by the 15th.

So, if your attorney can fashion something up in a [p. 45] short period of time, that may stop me from being able to enforce my order. But, that's entirely up to your attorney, Mr. Lin. But, I'm sorry. I have to call it the way I see it, and that's the way I see it, Mr. Lin.

* * *